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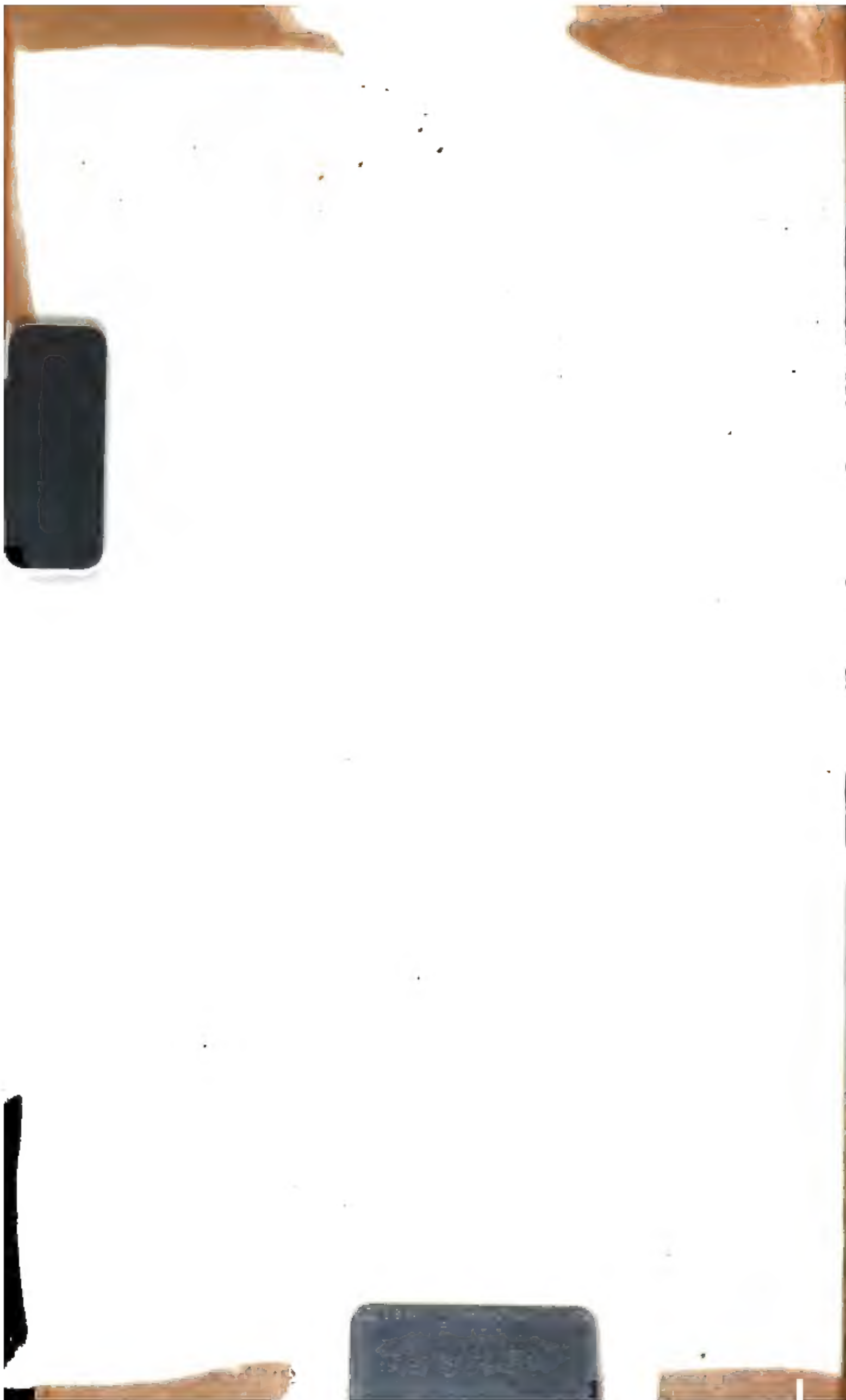
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**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**English Ecclesiastical Courts.**  
**WITH**  
**TABLES OF THE CASES AND PRINCIPAL MATTERS.**

---

**EDITED BY**  
**EDWARD D. INGRAHAM, Esquire.**  
**OF THE PHILADELPHIA BAR.**

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**VOL. III.**

**CONTAINING**  
**HAGGARD'S REPORTS, VOL. I.**  
**AND**  
**FERGUSSON'S SCOTTISH CONSISTORIAL REPORTS.**

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**REPORTS OF CASES**  
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**AT**  
**Doctors' Commons;**  
**AND IN THE**  
**HIGH COURT OF DELEGATES.**

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**By JOHN HAGGARD, LL.D.**

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**VOL. I.**

**CONTAINING CASES FROM MICHAELMAS TERM, 1827, TO  
TRINITY TERM, 1828, INCLUSIVE, AND SOME OF  
AN EARLIER DATE IN THE SUPPLEMENT.**



**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**ECCLESIASTICAL COURTS.**

---

**ARCHES COURT OF CANTERBURY.**

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**The COUNTESS OF PORTSMOUTH v. The EARL OF PORTSMOUTH, by his Committee.—p. 1.**

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*(On the Extension of the Term Probatory.)*

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If due diligence has been used, the Court will grant an extension of the term probatory, in order that material witnesses may be examined.

THIS was, originally, a suit of nullity of marriage instituted in the Consistory Court of London, on the part of the Earl of Portsmouth, acting by his Committee; and, in an early stage of the proceedings, came up, by appeal, to the Court of Arches, where, on the third session of Hilary Term, 1827, it was retained.

On the third session of Trinity Term, an allegation, on behalf of Lady Portsmouth, which consisted of thirty-one articles (besides the concluding article,) with five and thirty exhibits, was admitted without opposition. On the first session of the present term, the answers to this allegation were brought in; and, on the same day, *Jenner*, as Counsel for Lady Portsmouth (after reading the affidavit of the Proctor, as to his inability, during the long vacation, to examine all the witnesses upon his allegation, on account of their great number, and the absence of many of them from London,) applied for an extension of the term probatory; and the Court then ordered "the assignation to prove" to be continued; but directed that an affidavit should be exhibited, stating the names of those witnesses whom it was proposed to examine, and further, that they were material witnesses. In compliance with this order, Lady Portsmouth had made an affidavit, which set forth, "that notwithstanding the utmost diligence and activity had been used by her Proctor, there still remained several important witnesses [stating some names and addresses] who were likely to be able to depose to the capacity of the said Earl of Portsmouth, and that material evidence might be expected from them."

When this affidavit had been read, *Lushington*, on the part of Lord Portsmouth, said—that the affidavit did not apparently, contain an enumeration of all the witnesses whom it was intended to produce: however,

he would not object to the sufficiency of the affidavit, nor to the extension of the term probatory, on a clear understanding that the names and descriptions of any further witnesses, proposed to be examined, should be communicated in a day or two.

To this arrangement Lady Portsmouth's Counsel acceded.

*Per Curiam.*

THE COURT is extremely anxious not to preclude Lady Portsmouth from an examination of the witnesses she may think of importance to her cause. The circumstances of the case are very special; and it is quite proper that the party should have a full opportunity of defending the legality of her marriage. As the proposal of Lord Portsmouth's Counsel has been acquiesced in, the Court will grant an extension of the term probatory till the first of January, 1828; but it must expect that the defence will be conducted with due diligence.

In reference to this and similar applications, arising upon the Orders of Court issued on the first session of Easter Term, 1827, the Court observed,—that the consent of the adverse Proctor would not alone be sufficient to induce the Judge to continue a term probatory as matter of course, though it would have great weight with him as showing “reasonable cause;” but the circumstances must be stated to the Court for its approbation, and this for the sake of the suitor, lest too much facility of accommodation should be given. This regulation would also, practically, be found convenient to the Proctors, as a justification for declining to accede, without strong grounds, to a postponement.

The Court took this opportunity of reading certain Orders passed in 1684; and, after stating their history, pointed out the strictness with which the expediting of causes was enforced.

#### NORRIS v. HEMINGWAY.—p. 4.

##### *On Motion.*

Payment of a legacy decreed to a married woman, “whose receipt was to be a discharge to the executor, notwithstanding coverture;” her husband (a bankrupt) and his provisional assignee being first cited.

JAMES ELLIOTT, by his last will and testament duly executed in writing, among other legacies, bequeathed the sum of 100*l.* to Sarah, wife of Thomas Norris; and directed “that the receipts of the several female legatees should be a sufficient discharge notwithstanding any present or future coverture.” On the 31st of August, 1826, probate of this will was granted by the Prerogative Court of Canterbury to John Hemingway, the sole executor; and, on the 14th of September, 1825, a citation issued under seal of this Court—the Court of Arches, at the suit of the said Sarah Norris, calling upon the executor to answer to her in a cause of subtraction of legacy.

To this citation a Proctor appeared, and alleged, on the part of the executor, that Thomas Norris, the husband, had, since the death of the testator, assigned his estate and effects to a provisional assignee, appointed by the Court for the relief of Insolvent debtors, and to whom, as he (the executor) was advised, the interest in the said legacy had passed. The Proctor then brought into the registry of this Court, 90*l.*, as the

amount of the legacy *minus* the duty, and the executor was dismissed, without opposition, from the effect of the citation.

On this day, *Lushington*, for the legatee, after referring to the case of *Lee v. Prieaux*, 3 Bro. C. C. 381, where the husband was also a bankrupt; and where Lord Alvanley (Master of the Rolls) held, that, in the bequest of a legacy to a feme covert, the words "her receipt to be a sufficient discharge to the executors," was equivalent with saying "to her sole and separate use;" moved, that the money, in this case, should be paid out of the registry to Mrs. Norris upon her own receipt.

*Per Curiam.*

THE COURT said—though, according to the adjudged cases, little doubt could be entertained that this was a bequest to the separate use of the wife, yet, as the husband was insolvent, and the interest of the creditors might be affected,—It should direct, in the first instance, the husband and the provisional assignee to be cited, to show cause why the legacy should not be paid to the legatee.

A decree, with intimation, was accordingly served, personally, on the husband and the provisional assignee; but they offered no opposition. On the fourth session, therefore, the Court directed the legacy to be paid to Mrs. Norris.

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## RICHARDSON v. RICHARDSON.—p. 6.

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### *On admission of the Libel.*

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1. In a cause of divorce, articles to account for the husband's delay in instituting the suit are admissible, but need not be examined to unless the defence renders it necessary to justify his conduct.
2. If adultery, continued for many years, attended with pregnancy, and birth of a child, during the husband's absence from Great Britain, be pleaded, it is useless to prove more than a few facts—such as the birth of a child, identity, and non-access.

THIS cause was brought by letters of request from the Commissary of Surrey, and was a proceeding for a divorce by reason of adultery charged against the wife. The question now before the Court was, the admissibility of the libel, which entered into a detailed account of the marriage, separation, and subsequent history. It consisted of twenty-eight articles.

The first article pleaded, that on the 25th of March, 1802, Robert Richardson and Marianne Romney were married at Calcutta, in the East Indies, according to the rites and ceremonies of the Church of England, and an entry of their marriage was made in the register.

The second, that copies of the registers, duly authenticated, are annually sent over by the Governor General in council, and deposited among the archives of the India House.

The third, that the exhibit, No. 1, is a true copy of the entry of their marriage, extracted from the said archives.

The fourth, that the parties cohabited in India till December, 1812, and had seven children, four of whom are living. That Mrs. Richardson then came to England on account of her children's health; and ac-

accompanied by them; that Mr. Richardson was and has ever since been necessarily detained in India; that, *notwithstanding she had been extravagant in India,*(a) he made a liberal provision for her and her children.

The fifth, that he consigned her to the care of his brother-in-law, the Honourable and Reverend Edward Turnour, and to his step-mother, the Dowager Lady Winterton, who, as well as his other relations, received and treated her kindly.

The sixth, that shortly after her arrival in England, she *entered into a dissipated mode of living, and incurred debts to a considerable amount,* and evinced great and unbecoming levity; that, after remonstrating, the Dowager Lady Winterton, and Mr. Richardson's relations and friends, withdrew from her their countenance, and declined all personal intercourse.

The seventh, that in the beginning of June, 1814, Lady Winterton wrote an account of what had passed to Richardson, and inclosed a letter she had received from Mrs. Richardson, in answer to her remonstrances.

The eighth exhibited those letters.

The ninth, that Richardson, on receiving these letters, sent over a power of attorney, authorizing his brother (who was then in England,) and two friends, Cartwright and Brown, to remove his children from Mrs. Richardson, to conclude an agreement for a separate maintenance, to execute the necessary deeds, and also to institute a suit for divorce; and directed that his wife should be allowed a sum not exceeding 300*l.* a year.

The tenth exhibited letters to Lady Winterton, communicating such his resolutions.

The eleventh, that the children were removed, and articles of separation entered into; and that an annuity of 300*l.* a year was settled upon her.

The twelfth article exhibited the deed of separation.

The thirteenth, that soon after the execution of the deed, Mrs. Richardson removed from Hampstead, and that his relations had no further intercourse with her; that the annuity was regularly paid to Robert Barker, one of her trustees, on his producing a receipt, signed by her, in proof that she was alive. That Francis Richardson, the brother, who had returned from India in June, 1817, having, in the middle of the year 1819, heard that she had been living and was carrying on an adulterous intercourse with one Verity, applied to Barker to be informed of her residence, which was unknown to, and concealed from, the husband's relations; that on Barker's declining to inform him, he stopped the annuity, but shortly after received two letters from her, the last dated from Brighton; that then the annuity was again paid to her trustee; that Francis Richardson made inquiries at Brighton where, and with whom, she was living, but could not discover.

The fourteenth, that Francis Richardson, in 1819, communicated, by letter, to his brother the reports he had heard of his wife's conduct, and his endeavours to discover her, with a view to institute proceedings for a divorce; that Robert Richardson supposing, erroneously, that proceedings would be, or had been, instituted against her under the power of attorney, gave no directions; but, at length, having learnt that his personal authority was necessary, he executed a proxy, and transmitted it

(a) The sentences, printed in italics, were struck out by order of the Court.

to Francis Richardson; that it arrived in England about the middle of June, 1825, when Mr. Cartwright being dead, and Francis Richardson on the continent, and Mr. Richardson's relations unwilling to render public Mrs. Richardson's misconduct, some delay took place; but upon the continued adultery, as was subsequently pleaded, having been ascertained, Francis Richardson felt himself compelled to proceed.

The remaining articles pleaded adultery, from 1816 to the time of giving in the libel, with three different persons in succession, her pregnancy by one of them, the birth of a child in 1824, declarations as to who was the father, and cohabitation with the other two as their wife, and adoption of their name; identity, diversity, and the usual formal articles.

*Dodson* and *Pickard* in opposition to the libel.—The certificate of the marriage is a copy of a copy: this is not a proper mode of pleading, but we do not press the objection. The principal objections are, first, that the husband having so long forbore bringing the suit, is barred. In 1814, he was informed of her levity; the deed of separation gives her licence to live with whom she pleased, and that the husband will not disturb her.—[*Court.* As a feme sole,—not in a state of adultery. Deeds of this description have always been so construed; and this deed is in the usual terms.] In 1819, the husband was positively informed she was living in open adultery: he knew no suit was begun, for the annuity continued to be paid; and the proxy, *i. e.* his personal authority, confirmed what was done under the power of attorney.—[*Court.* But does not that confirmation lead to the inference that he, *bona fide*, conceived proceedings had been instituted?] The other objection is, that pleading the extravagance of the wife is irrelevant, and will lead to useless contradictions.

*Jenner* and *Lushington*, *contra*, were stopped by the Court.

#### JUDGMENT.

Sir JOHN NICHOLL.

The first three articles, only go to establish the marriage; and though a formal objection was taken to the mode of pleading the register, it was not pressed, and I, therefore, need not consider it. The eleven next articles enter, at considerable length, into the history of the parties, not, as I conceive, for the purpose of proving adultery, or of criminating the wife, but to account for the conduct of the husband, and to remove any unfavourable impression that might arise—if the delay in bringing the suit were not explained. In this view the general substance is admissible; and furnishes a sufficient reason why the husband should not be precluded, on the ground of laches, or acquiescence in his wrong, from proceeding in this suit. This is the answer to the first objection: at the same time the Court will not expect these articles to be examined to, unless the wife should set up such a defence as may render it necessary to prove all the preliminary history, in order to the husband's justification. The other objection to the irrelevancy of the parts that plead the extravagance of the wife is, I think, quite sound; and I shall direct the libel to be reformed in this respect, as the introduction of any such matter will lead to useless expense; and load the cause with pleading, and evidence that cannot have any real bearing on the point at issue.

The remaining articles minutely detail Mrs. Richardson's various adulterous connexions. It cannot be essential, and, consequently, it would not be proper, to examine to them all. If there is full proof of

a few of the facts, particularly of the birth of the child, of her identity, and of her husband's absence in India, as pleaded; this is all that can be essential. To trace her to all the different parts of the kingdom where the adultery is laid, would lead to an expense quite enormous, and which would be oppressive even to the wife, who will, almost necessarily, have some *extra* costs to pay; but it would be still more oppressive to the husband, on whom the ordinary costs of both parties fall, if these Courts were to require such a superabundance of proof. I have thrown out these suggestions in the hope of preventing expenses, that may well be spared, and, at present, have only to admit the libel with the slight alteration that I have mentioned.

Libel to be reformed.

On the by-day after Hilary Term, 1828, the Court pronounced that this libel was fully proved: and on an affidavit that Mr. Richardson was residing in the East Indies, and not expected to return, the Court permitted the bond, enjoined by the 107th canon, to be entered into by his brother; and then signed the sentence of separation.

### JENKINS v. BARRETT.—p. 12.

#### *An Appeal from the Consistory Court of St. David's.*

On appeal in a criminal suit [for brawling], an extension of the term probatory being prayed by the Promoter, a delay of nine months without making substantial progress in the cause, or examining a single witness, (after the suit had been already depending, in the Court of Appeal, two years) is a sufficient ground to dismiss the defendant, and condemn the Promoter in payment of a sum *nomine expensarum*.

In a suit for brawling, under 5 & 6 Edw. VI. c. 4. s. 1. the words of *brawling* must be set forth in the articles. The words "other enormous ecclesiastical offences" in a citation, are surplusage, and will not support a charge of *smiting* under 5 & 6 Edw. VI. c. 4. s. 2.

A threatening posture is not *smiting* under the statute.

5 & 6 Edw. VI. c. 4. was not intended to abridge the ecclesiastical jurisdiction in cases of *brawling*.

### BARRETT v. BARRETT.—p. 22.

#### *On Motion.*

A party being before the Court in a suit for divorce by reason of cruelty, acts of adultery subsequent to the citation may be pleaded.

THIS suit was originally brought in the Commissary Court of Surrey; and was promoted by Rowena Barrett against her husband, George Barrett, for a divorce by reason of his cruelty.

The citation was returned on the second session of Michaelmas Term, 1826. Upon the admission of the libel, the cause was appealed; and, on the by-day after Trinity Term, 1827, this Court pronounced against the appeal; but, at the petition of both proctors, retained the cause. On

the first session of the present term, the proctor for the husband confessed the marriage, but otherwise gave a negative issue. The proctor for the wife was assigned to prove the libel.

*Lushington* now moved, on affidavit, to permit additional articles to the libel, or an allegation, to be given in, pleading acts of adultery by the husband, subsequent to the commencement of the suit.

*Arnold* opposed the motion.

*Per Curiam.*

As the wife will be clearly entitled to a separation on account of the adultery, if proved, the only question is, whether a new citation is necessary. I think it is unnecessary, since the husband is already before the Court; and since it cannot be objected that any distinction exists between the proceeding on one ground or the other. It would, therefore, save useless expense to receive the allegation, notwithstanding the original citation was only for cruelty.

Motion granted.

### HAMERTON v. HAMERTON.—p. 23.

#### *An Appeal from the Consistory Court of Gloucester.*

- 1 When Alimony, *pendente lite*, is decreed to commence from the return of the citation, all sums paid subsequent to that return are to be allowed as part payment. 2. When no sufficient cause is shown for neglecting to comply with a monition personally served, a party may, at once, be pronounced contumacious: but *aliter*, for a mere informality, if he has virtually obeyed, or is ready to obey, the monition.

THIS was originally a proceeding in the Episcopal Consistorial Court of Gloucester, in a cause of divorce, by reason of adultery, brought by William Medows Hamerton, against Isabella Frances Hamerton, his wife. The citation in the Court below was returned on the 26th of April, 1827. On the 2d of August the libel and the allegation of Faculties were admitted; upon which alimony of 300*l.* per annum, to be paid monthly, *pendente lite*, and to commence from the return of the citation, was decreed. A monition issued at the same time, for payment. On the 3d of August this monition was executed by a personal service on Major Hamerton, the promoter of the suit; and, on the 27th of September, it was returned as duly certified, when, no appearance being given to it, the contumacy of the husband was accused, and a certificate thereof instantly granted(a). Receipts for various sums, as paid to the wife by the husband, afterwards, during the sitting of the Court, produced and rejected.

On this an appeal was presented to the Court of Arches; and the *præsertim* of the appeal was, "for refusing to allow any or either of the sum or sums of sixty pounds, and seven pounds ten shillings, paid by the said William Medows Hamerton to the said Frances Isabella his wife, or to her agent, since the institution of this suit, to be taken in part of alimony decreed in the cause; and for pronouncing, at the same Court, the said William Medows Hamerton to be in contempt for not

(a) See 53 Geo. III. c. 127.

appearing to a certain monition issued against him for payment of the same.”(a)

*Lushington* and *Dodson*, for the appellant.

*Jenner* and *Addams*, *contra*.

JUDGMENT.

SIR JOHN NICHOLL.

It is difficult to ascertain from the process what was done, or intended to be done, in this cause by the Court at Gloucester—whether the monition was obeyed or evaded and resisted. The monition itself is thus worded,—“That William Medows Hamerton do pay or cause to be paid to Isabella Frances Hamerton or to her proctor, for her use, an alimony *pendente lite* of twenty-five pounds per month, the same to be computed from the twenty-sixth day of April now last past, and so from thenceforward every month during the continuance of this suit, under pain of the law, and contempt thereof.” This monition, therefore, does not require a personal appearance; nor does it direct the payment of the alimony into Court—but to the party, or her proctor. As far as I can discover, the party, on whom this monition was served, did not intend to be contumacious, but proposed to show that he had complied with the orders of the Court. Three months had elapsed from the return of the citation to the *date* of the monition: at which time 75*l.* only were

(a) [1827. Arches. M. T. 1st Session.] Notwithstanding this appeal and the inhibition served on the Judge, the registrar, and the adverse proctor, the Court below was proceeding to follow up the decree of contumacy by certifying the contempt of Major Hamerton to the Court of Chancery; when *Lushington* applied to this Court for its interference.

*Addams*, *contra*, stated that these steps had been taken in error; but that Major Hamerton was in no danger of arrest.

The Court said that the measure complained of was certainly very irregular; but as the inhibition had not been returned, this Court had nothing before it upon which to act: It had, however, no doubt that on this expression of its opinion, the proceedings would be stayed.

On the same day, in the VICE-CHANCELLOR'S COURT, Mr. *Koe* applied for an order to restrain the Cursitor of the Court from issuing out a writ *de contumace capiendo* against Major Hamerton, on the ground that he had appealed from the Ecclesiastical Court of Gloucester; but before the inhibition could be served, the Court of Gloucester had granted a *significavit*; and upon the production of that instrument, a writ for the arrest of Major Hamerton would issue, as of course. Under these circumstances, Mr. *Koe* trusted his Honour would interfere to protect this gentleman from arrest on a process that was notailable. He had used every diligence in procuring the inhibition, so that no blame was attributable to him on that head. [The VICE-CHANCELLOR asked why the Court of Arches did not interpose its authority, for the purpose of enforcing its own order?] Mr. *Koe* replied, that the Ecclesiastical Court could not now protect Major Hamerton, as the affair had passed into the hands of the officer of the Court of Chancery.

The VICE-CHANCELLOR, on referring to the Act of Parliament (53 Geo. III. c. 127), found that the officer was “authorized and required to grant the writ upon the production of the monition.” His Honour, therefore, felt that he could not be justified in making an order in opposition to a positive Act of Parliament. The case was a novel one, and might, in his opinion, be mentioned to the Lord Chancellor.

The LORD CHANCELLOR, on the same day, refused to entertain the application until notice should be served on the wife; and, being informed that she was in France, said, notice to her Solicitor would be deemed good service.—Further steps were, however, unnecessary, as no attempt was made to sue out the writ, after the opinion expressed by the Court of Arches.

due to the wife for alimony; but taking the period to the *return* of the monition, only five months had passed, and consequently 125*l.* would, on that calculation, be the utmost extent of her claim. Now, on the 27th of September, the day on which the monition was returned, what does the husband's proctor do? He refers to certain receipts, purporting to be for various sums paid to the use of the wife, amounting together to 127*l.* 10*s.*, and "also a proportionate part of 70*l.* as part of alimony decreed." What then is meant by this? The dates of the receipts are not given; no affidavits are offered to show that these payments had been actually made since the return of the citation—the receipts themselves were not exhibited, or, at least, they are not transmitted in the process to this Court. It seems, however, from the *præsertim* of the appeal, that it was intended to establish that certain payments had been made to the wife, since the institution of the suit, and, therefore, that the party was not in contempt. But it is difficult, from the documents before me, to pronounce, confidently, with what object these receipts were brought to the notice of the Court, or, whether the Judge did right or wrong in the steps he then took. If there were no affidavit to show that the receipts were for payments made subsequent,—*q. fortiori*, if by the dates it appeared that they were prior,—to the return of the citation; if no later payment were attempted to be proved, and no reasonable cause assigned for the neglect—in that case, as the monition had, on the 3d of August, been personally served on the husband, I am of opinion that the Court was justified in enforcing its decree by pronouncing him contumacious. If, on the other hand, the receipts were dated after the citation, and the mere want of affidavits to authenticate them, was the principal informality to complain of, the Court should have allowed a short time to the party to verify their contents before it certified him to be in contempt.

But in every point of view, there is sufficient to induce me to arrive at this conclusion, that it will be beneficial for all parties not to remit the cause. I wish it, however, to be distinctly understood, that if these payments were made after the return of the citation, they must be deducted as so much on account of the alimony that has been allotted to the wife; but if before, then they are not to be deducted; and the husband must forthwith pay the balance that is now due, and proceed immediately to the examination of his witnesses upon the libel. I pronounce for the appeal, and retain the cause.

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### WYLLIE v. MOTT and FRENCH.—p. 28.

(*On the Admission of the Libel.*)

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In a libel for perturbation of seat, a title must not be pleaded as founded on purchase, sale, letting, or bequest, all which are illegal and void. The suit may rest on a possessory title, and acquiescence of former Church-wardens, and on the fitness of the party—from the number of family, amount of property, &c.

Pews in a church belong to the parish for the use of inhabitants, and cannot be sold, nor let without a special Act of Parliament.

Church-wardens must exercise a just discretion in the allotment of pews, subject to the correction of the Ordinary.

A party not giving in his answers on the day of the return of the decree per-

sonally served, will be pronounced contumacious: *similar* a witness not appearing to a compulsory.

The occupier of a pew, ceasing to be an inhabitant of the parish, cannot let the pew with, and thus annex it to, his house, but it reverts to the disposal of the Church-wardens.

A pew can only be appropriated to a house by faculty, or by prescription.

In a suit for perturbation of seat, if it appears that the Church-wardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish by taking the pew more out of the power of the Church-wardens.

The Office of the Judge promoted by OLIVER and TOLL v. HOBART.—p. 43.

*An Appeal from the Episcopal Consistorial Court of Exeter.*

In criminal suits, as for adultery, &c. articles must be so specific as to afford a fair opportunity of defence.

## PECULIARS COURT OF CANTERBURY.

MAGNEY and Others v. The RECTOR, CHURCH-WARDENS, and PARISHIONERS of the United Parishes of St. MICHAEL, PATERNOSTER ROYAL, and of St. MARTIN VINTRY.—p. 48.

*(On Motion.)*

A faculty for the appropriation of a vault "to the use of a family, so long as they continue parishioners and inhabitants of the parish," will be granted, if it may be done without probable inconvenience to the parish.

## PREROGATIVE COURT OF CANTERBURY.

MORRELL v. MORRELL.—p. 51.

*On Motion.*

The Court will grant administration with a nuncupative will annexed, as contained in an affidavit of three witnesses, holding that 29 Car. II. c. 3. s. 23, applies to *merchant* seamen.

CHARLES MORRELL, while second mate on board a merchant-ship homeward bound from Jamaica, died at sea, on the morning of the 25th of February, 1827, after an illness of three weeks.

The deceased, on the evening preceding his death, being then confined to his hammock, requested the attendance of the master and stew-

ard of the vessel, as also of a surgeon in the royal navy (a passenger on board,) and then, in their presence and hearing, addressed them (as set forth in their affidavit sworn on the 6th of April) to the following effect:—"That he wished to make his will; and that it was his desire that all the property he should die possessed of should go to his mother, to act respecting it as she might think proper." The affidavit further stated, "that from the weather being then so tempestuous, and from the rolling of the ship, it was scarcely possible for any one to have written a paper of any length at that time; and the master being constantly engaged on deck, the preparation of a will for the deceased to execute was postponed, and he died without having made any will other than that which he had thus expressed." The personal estate of the deceased, consisting of a balance of wages, his watch, and wearing apparel, was sworn to be under the value of 20*l*.

The deceased left behind him his mother, and two brothers—both minors—the only parties entitled in distribution to his personal estate in case he had died intestate. In the month of August, a decree, with intimation, issued at the instance of the mother; and having been personally served on the two minors, in the presence of their aunt (after their mother, their next of kin,) and on the said aunt, at whose house they then were:—

*Lushington* now moved, that letters of administration, with the will nuncupative annexed of Charles Morrell, the deceased, be granted to Sarah Morrell, widow, the natural and lawful mother, next of kin, and universal legatee therein named. It seemed to him that this will did not fall within the restriction imposed on nuncupative wills by the statute of frauds, though some doubt had been entertained whether the 23d section applied to seamen on board merchant ships.

*Per Curiam.*

THE COURT was of opinion, that this will, being made at sea, would come under the exception in the 23d section of the statute of frauds; but said, that in this case, there was what was nearly tantamount to a *rogatio testium*, as appeared from the full statement of facts given in the affidavit of three disinterested and respectable persons. The property was very small, and the disposition natural. The Court, therefore, decreed administration with the will, as contained in the affidavit, to the mother as sole legatee—no executor having been named.

Motion granted.

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YOUNG, otherwise MEARING v. BROWN.—p. 53.

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*On Motion.*

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An administrator, *pendente lite*, will be appointed, such appointment being necessary from the nature of the deceased's property, and from the conduct of one of the parties in the suit: and the nominee of the other party, on whose conduct there is no imputation, may be selected if shown to be impartial, competent, and responsible.

*Phillimore* moved for an administration pending suit, on the affidavit of Mr. Young, one of the parties:—"That the deceased, James Brown Urwin, was, at his death, possessed of certain freehold and leasehold

houses (at Bethnal Green, and in Quaker Street, Spitalfields,) some of which are tenanted by persons accustomed to pay their rents weekly, and that unless they are so collected, there is great danger they may be irrecoverable. That Brown, the other party, since the commencement of this suit, has received some of the rents, and distrained for others; and having removed some of the household furniture and goods belonging to the deceased from his late dwelling-house, retains them in his possession." Young further made oath, "that he verily believes it is for the interest of this estate, that there should be an administrator pending the suit; and that William Gale, of Bethnal Green Road, who was the chief collector of the deceased's rents during his life, should be so appointed.

*Per Curiam.*

This is an application for a grant of administration *pendente lite*; and the first question is,—whether any necessity exists for the grant. The estate consists principally of houses, of which the rents must be collected weekly, otherwise there will be great danger of loss. This fact, as well as Brown's conduct, in collecting the rents, shows a necessity for the grant. The Court, then, is satisfied that an administration, pending suit, is proper in this case; and the next question is,—to whom it shall make the grant. The Court never selects either of the parties, but generally an indifferent nominee. Young is executor of a latter will,—there is no imputation on his conduct; but from the proceedings it appears, that Brown took probate, and, in some degree privately, of an earlier will; and he has since got possession of some of the effects,—conduct which was improper, and which is not denied. Who, then, does Young propose? Mr. Gale—who filled the office of receiver during the lifetime of the deceased: he knows the property,—no objection is offered to his responsibility and impartiality, nor any dissent expressed to his appointment. \* Let the decree issue to him.

Motion granted.

On a prayer to condemn Brown in the costs, the Court declined so to do. It thought the application premature, as the motion had been entirely *ex parte*; besides, no objection had been made to the person proposed, by Young, as administrator.

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LAW v. CAMPBELL.—p. 55.

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*On Motion.*

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The Court will grant administration, with the will annexed, to one of two universal legatees, a decree with intimation having issued in the name of the other, who was since dead.

JAMES LAW, late a lieutenant in His Majesty's 46th regiment, died on the 20th of October, 1823, in the East Indies, leaving Lieutenant Campbell, on duty in that country, sole executor of his will. The deceased appointed his uncles, Henry and Edward Law, universal legatees. In July, 1827, a decree, with the usual intimation, issued at the instance of Henry Law, and was served on Lieutenant Campbell's agents, and also upon the Royal Exchange: no appearance being given, a decree, for the administration with the will annexed, passed on the Caveat-day, in October, to the said Henry Law: but this decree having become inef-

fective by his death, *Addams* moved the Court to rescind it, and to grant the administration, upon the original process, to Edward Law, the surviving universal legatee. He cited the case of *Maidman v. All Persons in general*, 1 Phill. 51, as analogous.

*Per Curiam.*

By granting this motion, the Court only waves the mere form of citing the next of kin; and it does not, under the circumstances, and the property being small, consider a new process necessary. The administration may pass.

Motion granted.

### CONSTABLE v. STEIBEL and EMANUEL.—p. 56.

Hand-writing and finding are sufficient to support a codicil confirming a legacy under a will; which codicil came out of the custody of, and was propounded by, the person solely benefited under it; who had been sworn executor of the will and one codicil four months before producing this paper, and the validity of whose legacy under the will was, at the time, a question depending in the Court of Chancery.

In the Courts of Probate it is almost a settled principle not to pronounce for disputed papers on evidence of hand-writing alone.

Evidence to the genuineness, not of a mere signature, but of a holograph of some length, is more cogent and weighty than evidence of a contrary tendency.

EDWARD EMANUEL, the deceased in this cause, a bachelor of the age of 25 years, died at Paris, on the 18th of March, 1825, of a wound inflicted by himself on the 16th of the same month. By his will, written with his own hand, and dated the 6th of July, 1824, he gave, among other legacies, the sum of 2000*l.* to Robert Constable; and appointed him, Sigismund Steibel, Samuel Steibel, and Henry Emanuel, his brother, executors. The latter he also made residuary legatee. The deceased likewise prepared and wrote a codicil, bearing date the 12th or 13th of March, 1825. Of this will and codicil Robert Constable and Samuel Steibel were sworn executors on the 12th of July following, but the probate did not issue until the 9th of September. In November of the same year, a bill in Chancery was filed against the acting executors (by Joel Emanuel, the father of the residuary legatee, who was a minor,) to compel them to account for the 2000*l.* bequeathed to Constable, on the ground that the legacy was void, in consequence of his being a subscribing witness to the will. Subsequent to the filing of this bill, Constable produced a paper in the following terms:

“13th March, 1825.

“I request Mr. Constable to pay my debts in France. His salary and 35*l.* to be paid independent of the 2000*l.* I bequeath him.

“EDWARD EMANUEL.”

In December, 1825, a decree issued, from the Prerogative Court of Canterbury, at the instance of Constable, citing his co-acting executor to take probate of this paper as a codicil to the deceased's will; and in Hilary Term, 1826, a further decree to see proceedings issued against Henry Emanuel, one other of the executors, and the residuary legatee. An appearance was given, by separate proctors, for both the parties cited: the paper was then propounded, on behalf of Constable, as a further codicil to the will of the deceased, and asserted to be all in his own

hand-writing: allegations were admitted in support of, and opposition to, this paper; and, upon the evidence taken on both sides,—

*Lushington* and *Addams*, for Constable, contended, that the weight of evidence was in favour of the genuineness of the hand-writing; that the account of the finding was natural and satisfactory; that the contents were probable; and that fabrication was highly improbable.

*Jenner* and *Pickard*, for the residuary legatee, argued that the time of producing the paper, and its date—on the very day on which the deceased and Constable had a serious quarrel, were very suspicious; that the finding was not inconsistent with fraud, as the box had been for some time in Constable's power; that the evidence to the hand-writing was contradictory and inconclusive: that the Court, therefore, would pronounce that Constable, on whom the *onus probandi* lay, had failed in proof.

*Dodson*, on behalf of Steibel, submitted to the judgment of the Court.

#### JUDGMENT.

SIR JOHN NICHOLL.

This case lies in a narrow compass, and is not attended with any particular difficulty. It has lost much of the importance which it possessed in its earlier stages, since I understand a Court of Equity has put the same construction on the statute, the 25th Geo. II. c. 5., as this Court had previously done; having decided that, in a will disposing only of personalty, a legacy to an attesting witness is not void by that statute. (a)

The question arises on a paper propounded as a second codicil to the will of Edward Emanuel. The will and first codicil are not contested: they are all in the deceased's hand-writing; the will is dated on the 6th of July, 1824, just before he went abroad; by this will he gives a legacy of 2000*l.* to Robert Constable, who had been a classical tutor in the deceased's family; and he appoints him an executor in conjunction with Samuel and Sigismund Steibel, and his own brother Henry, to whom he also bequeaths the residue. In July, 1825, probate was taken of this will, and the first codicil, by Robert Constable and Samuel Steibel, a power being reserved to the two other executors. The effects were sworn under 14,000*l.*; and I am informed that they do not exceed 13,000*l.* This probate did not pass the seal till the September following. In the month of November, of the same year, proceedings were instituted in the Court of Chancery, by the father of the residuary legatee, to obtain a decision of that Court as to the effect of the statute, the 25th Geo. II., upon the legacy to Mr. Constable, and, as I have already observed, it was there held that the statute does not apply to wills of personalty only. (b) In the mean time the codicil in dispute was propounded by Constable, who stated that it was all in the hand-writing of the deceased: it is in these words:—

“13th March, 1825.

“I request Mr. Constable to pay my debts in France. His salary and 35*l.* to be paid independent of the 2000*l.* I bequeath him.

“EDWARD EMANUEL.”

The last clause of this paper is now of no importance; and, to the salary;

(a) See the case of *Brett v. Brett*, 3 Add. 210. On the 21st of May, 1827, that decision was affirmed by the High Court of Delegates, after hearing Counsel for the Appellant only.

(b) *Emanuel v. Constable*, Rolls, 26 June, 1827. [3 Russ. Rep. 436.]

Constable would, of course, be entitled, unless there was something to show that it had been paid. The only effect, then, of this codicil is to recognize the debt for the money alleged to have been advanced. Now that such a sum was due, is not at all improbable; because it appears from the evidence that the deceased was obliged, on the morning he left Montmorency, to borrow twenty francs; and, from the papers in the cause, it seems that he must have been occasionally in want of money, although he had a letter of credit upon the cashier of Rothschild's banking-house at Paris. This sum of 35*l.* is, however, the whole matter in dispute; and the question is, whether this paper is genuine or fabricated—whether it is the hand-writing of the deceased, or a forgery. It is true that the burthen of proof, to show that the paper is genuine, lies upon Constable, the party setting it up; and though the acknowledgment of a debt of 35*l.* advanced as a loan, would be no sufficient object to induce the fabrication of such a document, yet as it also recognises the legacy of 2000*l.* under the will, that recognition might have been supposed of far greater importance. Is Mr. Constable, then, guilty of a forgery of this instrument, and to be condemned in the costs of these proceedings? for that is almost the only question to which this case is reduced: the Court would, certainly, require pretty strong proof before it would arrive at *that* conclusion.

The first evidence, in support of the genuineness of the paper, refers to the hand-writing. Here are several witnesses (so many, indeed, that it will be unnecessary to advert to the evidence of Hamilton,) intimately acquainted with the hand-writing of the deceased, who depose that, in their opinion, the paper was written by the deceased; and this affirmative evidence is, not to a mere subscription, which may be more easily and exactly imitated, but to a holograph of three lines: the witnesses, therefore, are more able to pronounce decidedly, upon such a paper, than if called upon to speak to a few letters composing a signature. This evidence then is, if evidence of hand-writing can be, of considerable weight. But the inclination, amounting almost to a settled principle, of this Court—founded perhaps on the facility with which hand-writing may be imitated—has been not to pronounce for a disputed paper on proof of hand-writing alone, but to require some corroborating circumstances. These are peculiarly necessary in the present case, where there is much conflicting evidence on this point; for there are a great number of witnesses, also well acquainted with the hand-writing of the deceased, who speak to their belief, that the paper is a forgery, being, in their opinion, unlike his ordinary character. These witnesses are not to be laid entirely out of consideration; but I never can think that evidence of dissimilitude is equally cogent, and weighty, with evidence of similitude, and for this reason—that it requires great skill so to imitate hand-writing, especially for several lines, as to deceive persons well acquainted with the original character; and who are not very likely to form an erroneous opinion, if, on carefully inspecting such a paper, they are satisfied that it is genuine. On the other hand, dissimilitude may be occasioned by a variety of circumstances—by the state of the health, and spirits, of the writer—by his materials—by his position—by his hurry, or care—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters. But the reasons given by this class of witnesses frequently shake their testimony; and we also know that when persons come prepared to

speaking in favour of a preconceived opinion, their evidence must be received with some degree of caution. Here, when the witnesses descend into particulars, their reasons are so trivial—so unsupported by the exhibits in the cause, and so discrepant from each other, that I think if they had not been swayed by prepossessions, they would hardly have ventured to arrive at the conclusion, that the paper in question was not of the hand-writing of the deceased.

A comparison of hand-writing is also resorted to; and, for that purpose, two engravers, on the part of the residuary legatees, are produced; but it is well known that men of this employment, from their habit of attending to the exact form of every letter, when engaged to make facsimiles, are so alive to the least dissimilitude, that any little difference would strike them as of importance. Here moreover they do not agree.—One engraver is confident that the codicil is not of the hand-writing of the deceased; while the other says, that he cannot venture to form an opinion, and that there is not such a difference as would justify him in asserting, that the paper in question was not written by the same person who wrote the will. Consistently with the cautious reserve of this last witness, a gentleman from the Bank deposes, that he sees nothing of a feigned hand in the instrument; but that, on the contrary, the likeness is so exact, that it would have passed a power of attorney. These are among the persons generally produced in this Court, to speak to feigned hand-writing. I have also looked into the answers of the party opposing this paper; and I do not find that they much vary the result of this portion of the evidence. Mr. Emanuel, the guardian of the minor, and father of the deceased, has so strong an impression, that he swears to his belief, that no part of the codicil is in the deceased's hand-writing; but Mr. Steibel, one of the acting executors, will not go so far,—“he cannot form a belief or disbelief, whether the subscription to the codicil is of the proper subscription of the deceased.” There is no testimony that carries this branch of the case further; and if I were bound to pause here, and to form an opinion whether this paper is in the hand-writing of the deceased, I would say that the evidence in favour of it so far preponderates, that I should be disposed to pronounce the codicil genuine.

But there is another point for my consideration, viz., the history of the paper itself, and of the finding. How was it produced? The first witness, on this part of the case, is Sophia Killen, a young girl, servant to Constable, the party in the cause. Constable's sister is also stated to have been present at the finding; but she is dead. Killen's account is to this effect—that when Constable returned from France, he brought two trunks and a box. The box was corded, and deposited in a back garret where she slept; that, one day in the beginning of August, 1825, she brought it down, by Constable's directions, into the parlour: it was then uncorded [there was, at this time, no question about the will] and opened; and was found to contain some articles of dress, a map, a dressing-box, and three books; that Constable took the books, from one of which the paper in dispute dropped; that he took it up and said, “how particular poor Emanuel was;” [a very natural observation for him to have made] that he gave it to his sister, who apparently read, and afterwards laid it upon the table.

This is the substance of the evidence that applies to the finding of this paper; and it has been asked, why did not Constable produce it at the time of this alleged discovery; but it was not found till after Steibel and

himself had been sworn executors; and he does not seem to have been aware that it was a document of any importance. His legacy under the will was not then contested; he could, therefore, have had no inducement, at that time, to fabricate such an instrument; and if it be a fabrication, and the finding were precontrived, it was a very cunningly devised method. This, however, is not, to my mind, the legal result of this part of the evidence. It is not at all improbable that he wrote it previous to the quarrel which is spoken to on the Sunday morning; for it is in evidence that he was, on that day, in a state of considerable excitement, and the contents of the paper itself point to an apparent contemplation of the fatal act by which he terminated his existence. The French ladies, at whose house the deceased was lodging, describe his agitation of mind on the day preceding his sudden departure for Paris; that he did not eat his dinner; that he exhibited much restlessness; and, on the following morning, came down stairs very early, looked pale, and was hurried in his manner; that he borrowed twenty francs of the daughter of the landlady, and then quitted the house.—It appears too, that Constable was surprised at this conduct, and in the course of the same morning, went to Paris in search of him—but without success; that he returned to Montmorency, and remained there two or three days, when having defrayed every expense, and repaid the twenty francs borrowed by Emanuel, he went back to Paris, where he discovered what had happened. After this, he remained at Paris above a month, during which time, Madame Le Duc, in whose charge he had left a box at Montmorency, forwarded it to him; and there is nothing in her evidence, nor in the evidence of her daughter, which would justify the conclusion that there were no books in the box at the time it was packed up, and sent to Paris.

If this paper, then, was not written by the deceased, when was it fabricated? It is perfectly improbable, that it was fabricated at Paris; besides, the case set up on the part of Mr. Emanuel, is—that the paper was fabricated, and prepared to meet the question raised on the will; and unless I can induce myself to believe that Killen, the maid-servant, has perjured herself, it seems impossible for me to pronounce that it was forged subsequent to the agitation of that question. And looking at the whole history of the transaction, there appears no improbability that the deceased should write this paper, when he intended to commit the act that led to his death: the fair inference is, I think, the other way.

Then it is said, it was not likely that Constable should have lent him 35*l.*; but why should he not have been competent to have advanced this sum? It is not probable that he should have quitted England without any funds of his own; and the deceased would rather, in my opinion, resort occasionally to his friend and guardian, or companion (whichever he might be), than constantly apply to the clerk at Rothschild's: nor is it extraordinary that he should remember the debt arising from this loan, and provide for the payment. The declaration to the surgeon, Mr. King, that he had been scandalized by his bosom friend—made subsequent to that act which, of itself, affords the strongest presumption of a diseased mind, can be but of little weight; and the hurried exclamation of Constable to Madame Delamere, when in a state of great anxiety, only shows that he but too truly foreboded the consequences of the morbid irritability of his friend. Besides, any reference to their dispute by one or the other, at that time, can have no bearing on the case, if, as I think not improbable, the paper was written previous to the quarrel.

It is unnecessary to enter further into a detail of this case. After the course this suit has taken, the Court could hardly pronounce against this paper, but on a conviction that it was a fraudulent and fabricated instrument. At that conclusion I cannot arrive: on the contrary, from a consideration of all the evidence, I believe it to be genuine; and I pronounce for it, accordingly, as a codicil to the last will of the deceased.

The question of costs is, in this instance, a matter of very little importance—they must necessarily fall on the estate.

*Lushington* then prayed—that, as Emanuel, the residuary legatee, had also a specific legacy, and this question was raised solely for his benefit, should the residue be deficient, the costs incurred by the two executors, Constable and Steibel, in this suit, should first be paid; and that in case the residue was not adequate to the discharge of all the costs, the expenses, on the part of the residuary legatee, should be borne by himself.—But the Court observed, that the residuary legatee was a minor; and as the paper was not produced till late, there seemed to be no reason to make any distinction.

The Court pronounced for the validity of the codicil; and decreed the costs of all the parties to be paid out of the estate.

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In the Goods of ARCHIBALD BATHGATE.—p. 67.

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(*On Motion.*)

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Written and verbal instructions being given from which a will was prepared, the execution of which was prevented by unforeseen circumstances, and by death: the Court—the widow consenting—will grant probate of the will so prepared, (though never seen by, nor read over to, the deceased,) in preference to granting administration with the instructions annexed to the widow; the deceased's intention being, clearly, to secure the interests of his children by the interposition of executors.

THE deceased was master of the ship *Robert*; and died, on the 18th of June last, at Montserrat, in the West Indies. He left a widow, and four children—minors; and a property of about 1500*l.* independent of a real estate in Scotland of 25*l.* per annum. On the 2d of December, 1826, he gave instructions, in his own hand-writing, to his solicitor, from which to prepare a will; and added some verbal directions as to the executors. Before these instructions could be fully carried into effect, it became necessary to make some inquiries respecting the real property; and the deceased, who was just going to sail, desired that the will might be sent to meet him at Portsmouth, to be executed. The will, and also a draft of a disposition of the real property, were forwarded to Portsmouth, but the ship did not touch there, and the deceased never returned to this country.

*Per Curiam.*

The question is, what paper should be proved: whether the instructions, in the hand-writing of the deceased, should be annexed to an administration to the widow; or whether probate of the will—written, and prepared, in his life-time, quite ready for execution, which was prevented only by accident—should be granted to the executors. There are many instances where papers not seen by, nor read over to, the deceased, have

been pronounced for in this Court, but, here, the executors do not appear: and though the Court would not refuse to grant an administration to the widow with the instructions annexed; yet—as she only takes a life interest in the property—or even less—for her widowhood, with remainder to the children, if the executors, who are also trustees, would, with the consent of the widow, take probate in common form, it would, much more completely, carry into effect the intentions of the deceased. The obvious wish of the testator was, by the interposition of executors and trustees, to secure the interests of the children; and the Court is also bound to protect their interests.

*Lushington* said,—there was no objection, on the part of the widow, to the suggestion of the Court; and, on a subsequent day, the executors proved the will.

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MYNN v. ROBINSON and Others by their Guardian.—p. 68.

(*On Motion.*)

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On affidavit, that an attesting witness has been diligently sought, and cannot be found, an executor may pray publication: but the other party has a right to a monition against the witness to attend for cross-examination, if they can discover him.

Deeds should not be annexed to an allegation; but be deposited in the registry, and the material parts only recited in the plea.

THIS was a cause of proving, in solemn form of law, the last will and testament of Catherine Mynn, late of Westbourne Green, Middlesex, bearing date the 2d of June, 1827; promoted by John Mynn, the husband, and sole executor, against William R. Robinson, the nephew, and an executor named in a will bearing date the 23d of November, 1826. On the By-day after Trinity Term, 1827, the adverse proctor declared “he proceeded no further” for W. R. Robinson; and then appeared for Thomas Maltby, and alleged him to be the maternal uncle, and guardian lawfully assigned to four infants, the younger children of W. R. Robinson; and, as such, contingent legatees in reversion in the will dated the 23d of November.

On an extra-day after Trinity Term last, an allegation, propounding the will of the 2d of June, was debated; when the Court directed the second article, annexing a long marriage settlement, to be reformed; and said—that in this, and all future cases, it would be sufficient to bring deeds into the registry; to recite, in the plea, the material parts; and to refer to the deeds as deposited in the archives of the Court, *Selwyn’s Nisi Prius*, p. 506–7.

On the Caveat-day, in August, this allegation was admitted, as reformed: and, on this day,—the drawer of the will, and two of the three attesting witnesses having been previously examined; and after reading an affidavit—that, as soon as the plea, propounding the will, had been admitted, the third subscribing witness had been diligently sought for, but that he could not be found, and that it was believed he had quitted the kingdom:—*Burnaby* and *Dodson* prayed publication, and observed,—that the husband was willing to rest his case on the proofs already adduced.

On the other side, *Jenner* and *Lushington* objected,—that the witness had not been advertised for; and that the affidavit did not enter into a proper detail of the diligence that had been used, nor of the inquiries made for his discovery.

*Per Curiam.*

THE COURT was, however, of opinion—that the affidavit was quite sufficient to account for the non-production of this attesting witness; and that the executor had, therefore, a right to pray publication, and put the opposers to plead in case they should think fit; and if, by greater diligence, their inquiries were more successful, and they should find the witness, they would be entitled to a monition against him to undergo an examination on interrogatories.

On the By-day, the Court—being informed, by the Counsel for the minors, that Robert Hone, the witness in question, was present, and ready to be examined,—directed him to be produced; when he was sworn by the Judge himself, and ordered to be examined *instantly*.

### HILLAM v. WALKER.—p. 71.

(*On Motion.*)

The Court having decided that a legatee, in a separate paper, is not executrix according to the tenor, she cannot oppose the validity of a former will; if she is paid her costs, and if the executor of that will is ready to take probate of the paper by which she is benefitted, and to pay her full bequest.

When a party is out of the kingdom, the Court will direct him to give security for costs.

The principle, on which costs are given out of the estate, is, that the party was led into the suit by the state of the deceased's testamentary papers.

SIDNEY WALKER, late a lieutenant in the East India Company's 4th regiment, died—on the 16th of March, 1826, on his passage to England—a bachelor—leaving a father, who had been resident at Naples for twenty-five years, during which period he and the deceased had not seen each other. In 1818, while Lieutenant Walker was in England, he became attached to, and entered into an engagement of marriage with, Miss Hillam; but, owing to his pecuniary circumstances, the solemnization thereof was deferred, and he returned to India. Previous, however, to such return, in one of his letters to Miss Hillam, dated Manchester, 5th of August, 1821, he enclosed a paper sealed up—with directions that it should not be opened till after his death. This paper was of the following tenor:—

Manchester, 4th August, 1821.

Sunday.

It is my wish when I die that you should have 500*l.* of my property that I get from Mr. Vaughan, and that my relations the Grants in America should have the same sum absolutely and my clothes and if any more comes to me independent of my share of my Grandmother's property left to us independent of my Mother (which is divided or intended by me amongst my Father and Mother Brothers and Sister) you should have a proportion of it equal to the proportion of 500*l.* to the

amount of Mr. Vaughan's property (my share) in expectancy or possession after paying my just debts—to agents in India besides another to the creditors of Mr. James Inglis—of perhaps 100%. or more that is left to you, to your Father and Mother after you, afterwards I hope you will give it back to my family, my Mother particularly. If you like to make inquiry for the Tidney in India well and good—Yrs.

S. Walker.

This you can show if any demur should be made by my relations and tell them, it is intended you should have that proportion of my property as it at present is and you can have it now or interest at 8 per cent till it is sold—Keep the snuff-box.

This letter was directed to Miss Hillam, and endorsed “not to be opened.” There were several alterations and interlineations; but, as nothing turned on the appearance of the paper, it has been printed without noticing them.

This paper was propounded by Miss Hillam, who gave in an allegation in support of it. In the mean time an appearance had been given for Richard Walker—the father and only next of kin. But the Court having directed, at the instance of Miss Hillam, on account of his absence from England, that he should give security for costs in the sum of 50*l.*(a), the appearance for him was withdrawn; and a fresh one given for his son, Henry Walker—acting as his attorney—and then resident in England. An authentic copy of a will executed in India, and bearing date on the 13th of April, 1817, together with a schedule of debts, dated May 13th of the same year, was *brought* in by the proctor for Henry Walker—who declared that he opposed Miss Hillam's allegation. From the admission of this allegation in Easter Term, an appeal was entered—an inhibition taken out, and afterwards relaxed; and the cause remitted; and, on this day, the proctor for Henry Walker declared that he did not further oppose the paper propounded by Miss Hillam; but intervened for Edward Stanhope Walker—a brother of the deceased, and an executor named in the will of 1817, and prayed probate of that will, and of Miss Hillam's paper as a codicil. This was objected to, as it was contended, that she was entitled to probate of the letter she had propounded as executrix according to the tenor; and it was stated, that she had lately discovered a further paper which confirmed that construction.

*Per Curiam.*

THE COURT is of opinion that Miss Hillam is not executrix according to the tenor; and is, therefore, not entitled to probate: but that, as the validity of the paper she propounded is now admitted, she is entitled to her full costs out of the estate. It has, however, been suggested that she has now discovered other papers which may give her a greater interest; but if that were not the case, and if she were paid all the benefit given her under the paper already propounded, together with her costs, she could have no interest in contending—whether the will now produced, be valid—or the deceased be intestate. The case must, at all events, stand over, till the papers, referred to by Miss Hillam's counsel, are produced; and, moreover, as it appears, that the will of 1817, now before the Court, was executed in India—in duplicate, and that the de-

(a) See Tidd's Practice, vol. i. p. 551-2.

ceased brought one part of it with him to England, which is not, at present, forthcoming—and which the law, therefore, presumes he has revoked; there are sufficient grounds for the Court to pause, and to refuse probate till the next of kin has been cited.

Before the allegation propounding the second paper was brought in, two codicils—dated the 12th and 14th of May, 1824—were transmitted from India by which the deceased referred to the will of 1817, and gave Miss Hillam the same benefit as by the paper she had already set up. (a) In consequence she withdrew from the suit; and the Court was now moved to decree her costs out of the estate.

*Lushington and Nicholl*, in support of the motion.

*Phillimore and Addams*, *contra*.

*Per Curiam*,

Miss Hillam propounded a paper that the deceased had left in this country—and which was established as far as it went. Afterwards other papers were sent over from India, under which she had the same interest: she then withdrew. So far, therefore, from having acted vexatiously, she, rather, has been harrassed by the next of kin—who, on the eve of the long vacation, entered an appeal—which he subsequently abandoned. But I act on the principle which always guides this Court in decreeing costs out of the estate, viz., that the party was led into the contest by the state in which the deceased left his papers. Miss Hillam, then, is clearly entitled to her costs: and, on the whole, I see no objection to the costs of all parties being paid out of the estate.

(a) "I have made a will in 1817 previously to going home to England in which I bequeathed, &c. . . . . I now wish that 500*l.* or 800*l.* if the Tottenham property is equal to 5000*l.* a share, be given out of my property, by my Father, Mother, Brother and Sister to Harriet Hillam of Penton Place, and to her mother Mrs. Hillam of Penton Place, in the event of Harriet Hillam's death. This may be a last request, and I trust it may be granted."

S. Walker.

Signed and written off the island  
of Cheduba on the evening of the  
12th of May, 1824.

In a continuation of this codicil he writes:—"My will of 1817 is, I believe, in a square patana at W. Cleighs at Calcutta."

The codicil of the 14th of May does not bear on the present question.

## REAY v. COWCHER.—p. 75.

(*On the Admission of an Allegation.*)

Where the widow, in opposition to a will, sets up habitual intoxication, weakened capacity, and custody, she may also plead insane dislike, on the part of her husband, to account for their living apart, though the delusion may not be sufficient, *per se*, to invalidate the will.

PETER COWCHER, the deceased, in this cause, died on the first of December, 1826, leaving behind him Elizabeth Cowcher his widow, a son Robert Cowcher, and a daughter Mary, the wife of Stephen Salmon. On his death a will, dated the 6th of March, 1824—a codicil dated 21st of October, 1826, and another codicil, without date, were found: the will, in two envelopes, in a tin box, and the two codicils folded together

and locked up (with a third paper) in a private drawer of his writing table.

The will was to the following effect:—

To his wife an annuity of 10*l.*—to his daughter, Mary Salmon, an annuity of 80*l.* for her sole use; and after her death, his executrices to appropriate such part of the annuity as they may think fit, for the education of her children: to his son, Robert Cowcher, 80*l.* per annum—with the same provision for children; and, in both cases—if no children—the legacies to become part of his personal estate:—To Mrs. Elizabeth Reay, his household furniture, linen, plate, china, books,—his interest in the lease of a house at Brixton Hill; and also two houses in London:—the residue, after payment of debts, to his executrices in trust to appropriate the balance of their accounts in purchase of government securities, and the principal and interest to his grand-children, share and share alike, at the age of twenty-two years. The testator then appoints Mrs. Elizabeth Reay, and her sister, Mrs. Jane Reay, executrices, and requests them to accept two and a half per cent. on the balance of their annual accounts, with mourning, and a ring to each; and gives them power to grant leases, &c. The will was signed, sealed, and executed in the presence of three witnesses. It was fairly written, though there were a few errors of orthography.

The codicils were as follows:—

I Peter Cowcher of Brixton Hill in the Parish of Streatham *\*of Streatham\** in the County of Surrey—require that this may be Entered as a Codicile of my former will that is respecting the Legacys—that apply to My Daughter Mary Salmon and my Son Robert Cowcher—so as

to be Paid an Annual Annuity by my Executerixs—<sup>in lieu of which</sup> I will and Bequeath—unto Mrs. Mary Salmon & her Children without any Claim of her Husband—a House situated in Davies St Berkeley Square—Inhabited by Mr Highham Surgeon & Clr.——& unto my Son Robert Cowcher & His Children a House situated—in Davies St Berkeley Square Inhabited by Mr Barrows—Surgeon & Clr. this being the only Legacies that I intend to leave them—the rest and residue of my pro-

perty ackording my Will *\*will\** go the Persons there specified with this

Exception that Instead of leaving *\*their\** <sup>my Daughter Mary and my Son Roberts *\*and their\**</sup> Children as Residentiery *\*Leg residentuary\** Legatirees—I will and Bequeath as my Residen-

<sup>Mrs E Reay my Executrix—to Dispose of the Residue as she thinks proper</sup> tuary Legaty <sup>to</sup> *\*Mr. Charles Kenrick Douglas now of Cambridge Colledge\**—& should Mrs Elizabeth Cowcher my Wife—or Mrs Mary Salmon my Daughter—or Mr Robert Cowcher my Son—Institute any Legal proceeding against this my Will & Codicile—I only request my Executrix's may cut them off with one Shilling Each. P. C.

Octr. 21st, 1826.

In addition to the Enclosed, I have to request of my Executrix's—that <sup>my</sup> should any unforeseen demands be made upon estate—that I—Invest them with full powers to sell to the Best advantage—my leasehold house in Alfred Place to answer my Just Debts that may be claimed on my estate.

\* The words in *\*italic\** were stricken through with the pen.

The will, and the two codicils, were propounded in an allegation, given in on behalf of Elizabeth Reay, spinster, one of the executrices, which pleaded the *factum*, &c. of the will, and codicils—the capacity of the deceased till immediately before his death—that the papers were all in his hand-writing—that they were found, on the day of his death, by Elizabeth Reay, and Robert Cowcher his son, and that they were in the same plight and condition as when found.

These testamentary papers were opposed by Mrs. Cowcher, the widow, who had given in a responsive allegation, consisting of sixteen articles.

The nine first articles, and the eleventh, pleaded certain circumstances in the conduct of the deceased, and declarations for the purpose of showing that he had taken an insane dislike to his wife, which, at length, reached such a height, that, in 1820, believing her life in danger, she separated from him; and that this dislike extended to his children, and to all persons who communicated with his wife or with them. These articles embraced a period of time from 1799 to 1825.

The tenth pleaded the deceased's cohabitation with Elizabeth Reay from 1820.

The twelfth and thirteenth,—habitual intoxication;—impaired faculties, health and spirits;—controul of Reay;—continuance of delusion.

The fourteenth, that the deceased in October, 1826, was prevailed upon, by the threats and entreaties of Reay, to write the codicil of that date—that Charles Kenrick Douglas, a friend of Reay's, but unknown to the deceased, was first appointed residuary legatee—that Reay afterwards prevailed upon deceased to substitute her name.

Fifteenth—that, during the deceased's illness, his children requesting to be informed of his health, Reay made her sister write, saying—that he was improving; that they called, but Reay would not allow any separate communication—she or her sister remaining all the time by the deceased's bed-side, and when he attempted to introduce the subject of his property, interrupted him, and would not suffer him to express his wishes.

Sixteenth—that at his death he was possessed of property yielding an annual income of 1200*l*.

The admission of the allegation was now opposed.

*Jenner and Dodson*, for the executrix.

*Lushington*, *contra*.

JUDGMENT.

SIR JOHN NICHOLL.

It is admitted that this allegation is so far properly drawn, that the objections lie rather to the general substance, than to the particular form of the articles. The allegation propounding the papers, merely pleaded the *factum* of the several instruments—the hand-writing and capacity; but did not enter into any history of the deceased's connexions or affairs. The case, now set up, is of a mixed nature—viz., insanity and dislike—habitual intoxication—weakened capacity—fraud, controul, and custody. The nine first articles, and also the eleventh—which plead delusion respecting his wife and children, who, he fancied, were engaged in a conspiracy against him—are said to be irrelevant. To this it is answered, that the articles are historical, and intended to account for the fact, that the deceased lived separate and apart from his wife, which would probably make its appearance in some later stage of the proceedings; and

might be injurious to the widow's case if it were not shown to arise from an insane delusion:—now, in this point of view, these articles may be of importance; though the facts, here pleaded, certainly would not alone have been of sufficient weight and stringency, to invalidate the will, if he had died as soon as it had been executed; particularly, as the will, by itself, is not inconsistent with the probable disposition of his property.

The remaining part of the case—both as it respects the later history of the deceased's life, and as it respects the nature, and appearance of the instruments—is far stronger. The disposition made by the codicils, and the condition of the deceased at the period of their execution, have a more direct and immediate bearing on the question, but the previous history may not be irrelevant, as, by accounting for the conduct of both parties, it will assist the Court in arriving at the true conclusion. My only doubt is, whether it might not be compressed into one or two articles; but, as short articles are sometimes more convenient, I shall leave that point to the consideration and discretion of the counsel: and on the whole, I am of opinion, that this allegation contains a case which is fit to go to proof.

Allegation admitted.

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In the Goods of HENRY SAMPSON FRY.—p. 80.

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*On Motion.*

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Directing certain persons to pay debts, funeral expenses, and expenses of probate, is an appointment of such persons executors.

THE deceased, by his last will and testament, executed in the presence of three witnesses, devised his real estates—subject, in exoneration of his personal property, to the payment of certain bond debts—to his son Joseph James Fry, his daughter Susanna Fry, and his friend Hawley Clutterbuck, and their heirs, upon trust—to receive the rents and profits—to appropriate a portion thereof, annually, in the purchase of stock—to pay his debts, funeral expenses, and the expenses of proving his will. They were also empowered to sell the estates. He gave his personal property to be equally divided between his said children, and appointed his daughter residuary legatee; but did not name any executor. He bequeathed a legacy of 20*l.* to Clutterbuck, in case he acted as one of his trustees; and directed that he should continue to collect the rents at an allowance of five per cent. upon the net proceeds.

*Phillimore* moved, that probate of this will be granted to Joseph James Fry, and Hawley Clutterbuck, as two of the executors according to the tenor. The personal estate, it was understood, did not exceed 450*l.*

*Per Curiam.*

THE COURT said—that paying debts, and funeral expenses, and expenses of proving a will, was performing the office of executor. The appointment of trustees was for the management and disposal of the real estate, and for no other purpose. There can be no doubt that the parties, for whom probate is now prayed, are executors according to the tenor.

Motion granted.

In the Goods of ANN JONES.—p. 81.

A party may commence a suit in *forma pauperis*.

*Per Curiam.*

ELIZABETH WAGNER is desirous of instituting a suit to call in probate of the will of Ann Jones; certainly it is more usual not to admit a party in *forma pauperis* till *after* proceedings have been commenced. But, in point of reason and justice, an application of this kind should be granted as well *before* as *after*,—assistance may be required to extract a citation. I shall, therefore, assign the present applicant, on her taking the usual oath, an advocate and proctor; she will, however, be liable to be disappointed, in case, upon the appearance of the party to be cited, it should be shown that she is not entitled to this privilege; as in all these cases a party is admitted *de bene esse*.

JAMESON and Others v. COOKE and Others.—p. 82.

*On the Admission of an Allegation.*

To entitle an unfinished paper to proof, it is necessary,—1st, to connect it most clearly with the deceased: 2dly, to show fixed and final intention: 3dly, completion prevented.

THIS was a business of proving, in solemn form of law, an alleged codicil or addition to the last will and testament of Lydia Ellison, late of the city of York, widow, promoted by Mary Ann Cooke, Edward Ball, Mary Watkinson, and Isabella Warne, four of the five legatees therein named, and four of the parties cited to propound the same, against William Jameson, the surviving executor of the said will, and Isabella Nunn, the other legatee named in the codicil, and also against the Reverend John Steward, two of the next of kin of the deceased.

The allegation, propounding the paper, in substance, was as follows:—

That Lydia Ellison died at York, on the 29th of April, 1826, leaving a personal estate of about 8000*l*. That, for thirty years, she had a great affection for, and intimacy with, Mrs. Cooke, and Mrs. Warne; and also had a great regard for Mrs. Watkinson, and Mr. Ball. That, in September, 1796, she made her will; and, after devising her real estates, gave a legacy of 100*l*. each to Cooke and Warne, and the proceeds of a sale of her estate at Saffron Walden to them jointly with Mrs. Nunn; that upon the death of the residuary legatee, she sold some of her real property, so that her personalty was much increased: and, intending to dispose of this, she, on the 3d of August, 1824, wrote the paper propounded; and *that*, in reference thereto, in October, 1825, while on a visit at Ball's, she made to Mrs. Gattie—one of his intimate friends—a testamentary declaration in his favour; that she engaged him and his family to visit her at York the following spring, and then to go to Harrogate; that, on a Monday, 24th of April, just previous to their coming, she received an injury by a fall, which her medical attendants did not think dangerous; but in a day or two she became lethargic and insensible, and died on the Saturday; and that, while sensible, she did not

consider herself in any danger. That Mr. Weatherby, her confidential solicitor, resided at Newmarket, and that she did not see him after the date of the codicil. That the will was found in a chest of drawers in the deceased's bed-room, with the envelope unsealed—and no other paper with it. That on the 23d of September, 1826, Jameson received an anonymous letter by the general post, with the codicil enclosed—stating, that it was found in the deceased's house, and was taken away with two sovereigns. That the deceased was penurious and suspicious—wore a pocket in front of her stays, and in it, she declared, she kept her private papers, having nobody she could trust; that Jane Cusworth was her only servant, and Ann Shouter was hired to assist in nursing; that, one morning, Shouter was observed with her hand in the drawers, and said, she was looking for a nightcap; that, soon after, she urged Cusworth to go down to breakfast, who, on her return, found her with the deceased's keys, and she desired Cusworth to lock up the said pocket, which she did, and delivered the keys to Mrs. Robinson;—that, on Saturday, 22d of April, the deceased received four sovereigns and silver in change for a 6*l.* note; that she had only spent 5*s.*; but, on searching her pocket after her death, there were only two sovereigns; and her purse could no where be found.

*Dodson and Salisbury*, for the executor.

*Addams and Blake*, for the two next of kin.

*Lushington and Haggard*, in support of the allegation.

JUDGMENT.

SIR JOHN NICHOLL.

This is a proceeding for the purpose of establishing a paper of a testamentary character, as a codicil to the will of Mrs. Lydia Ellison. It is brought forward by four of the legatees; and it is opposed by the executor named in the will, and by two of the next of kin. An allegation, in support of the instrument, has now been debated: I have considered the circumstances it sets forth, together with the paper itself; and the paper is so imperfect, and has to encounter such difficulties, that it is quite impossible, in my judgment, to overcome them, so as to give it effect as a testamentary instrument; even assuming—what the Court is bound to assume in the present stage of the cause—that every thing pleaded in this allegation is correct, and could be proved. The paper propounded is of this tenor:—

*\*Mr Weatherby I was Sir\** I give my house at York <sup>with</sup> *\*to be\** my money in the funds between Mrs Cooke at Great Baddow Mr Edward Ball Upper Stamford Street London Mrs Watkinson Burwell, Mrs Warn, Mrs Nunn if living *\*and I give at twenty\**

York August 3. 1824.

*\*Estate at Mildenhall I\**

It is in pencil—not signed—but is written on a scrap of an old letter, dated—Hull, 18th February, 1819, and still bearing on it the word “Madam.” In the first place, then, it would hardly be possible to prove such a paper genuine. The executor, in his affidavit of scripts, admits, as was remarked, that it is in the hand-writing of the deceased; but the Court could not safely trust to evidence of hand-writing for the purpose of establishing such a document. It is sent to the executor, four or five months after the death of Mrs. Ellison, in an anonymous

\* The words in *\*italic\** were stricken through with the pen.

letter, purporting to come from a person who is supposed to have stolen some money out of the deceased's pocket; and to have taken this paper at the same time. Why she should have taken this paper there is no suggestion; for it is alleged that she left two sovereigns, and, I presume, some other articles. It is just possible to conceive that she fabricated the instrument in order to make her peace. The hand-writing of the letter is as good as that of the paper, and is not unlike it. There is, then, no sufficient finding.

These difficulties relate to the proof of its genuineness: but, in the second place, there are still more conclusive difficulties as to its validity. Even if the paper were admitted to be genuine, and to have been found in the deceased's pocket immediately on her death, still, on the face of it, it would be inoperative, supposing it only to apply to personal property. Beyond all question, it is imperfect and unfinished; by calling it imperfect and unfinished, I mean that it is not reduced to *that* form in which the deceased purposed to leave it as an operative testamentary paper—nay it was scarce begun. It was not, at first, intended to be dispositive—it was the inception of a letter, or rather of a draft of a letter, to her attorney, Mr. Weatherby, at Newmarket, while she was living at York. She seems afterwards to have changed her mind; and the paper then goes on as if it were heads for a disposition of part of her personal property—her house at York, and her money in the funds. There is then the commencement of a further bequest—“and I give at twenty”—but this is struck through: then there is a memorandum as to part of her real property, but that also is struck through—“Estate at Mildenhall I.” The paper is a crude memorandum respecting some testamentary disposition, set down in pencil, as a passing thought, either on writing to her solicitor, or as heads for some subsequent paper. The presumptions are all strongly against it. The burthen of proof presses heavily on those who would establish it, to make out that it does contain that disposition which was manifestly her intention. The affection and regard pleaded for the parties benefitted, show that such a disposition was not improbable; but this goes but a little way of itself, though it may assist other circumstances.

It is said, however, that there are two further circumstances: first, the declaration respecting Ball—“he shall not want money long—I have taken care of that;” but to rely on this, and to apply it to such a paper as the present, would be dangerous in the extreme. The other circumstance is the accident, and that her death was unexpected: but this paper is dated twenty months before that event, viz., in August, 1824. Now to support any unfinished paper, there must be shown continued and final intention to the time of death, and the finishing prevented. To meet this difficulty, it is observed, that the deceased never saw Weatherby afterwards; but if she had intended to have made any such alteration in her will (which was executed thirty years before), she might have communicated with him by letter. She had abundant opportunity of taking further steps, if she had made up her testamentary intentions.

I shall, in my opinion, better consult the interest of the parties, in rejecting this plea: without doubt the paper is of no validity, unless the rules and principles of this Court are to be overthrown; and it would be attended with some risk of injury to those principles to allow this allegation even to go to proof, when the circumstances, if all quite true, are utterly insufficient to support the paper.

The Court rejected the allegation, but ordered the expenses of all parties to be paid out of the estate.

Allegation rejected.

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SMITH v. BLAKE.—p. 88.

The Court before granting a prayer to rescind the conclusion, in order to the admission of an allegation, requires an affidavit setting forth facts material as well as "*noviter herventa*;" and it generally also requires that the allegation pleading those facts shall be tendered at the time of making the prayer.

DAME ELIZABETH BLAKE died on the 23d March, 1827, a widow—leaving Sir Francis Blake, Baronet; Lieutenant-General Robert Dudley Blake; William Blake, and Eleanor Ann Stay—her only children. Her personalty amounted to 17,000*l.*; and by her will—executed in writing, but without date—she had appointed Hugh Smith, Esq., and the Reverend Hugh Smith—executors. On the 3d of April, probate was prayed by the Reverend Hugh Smith; and the grant thereof was opposed by Lieutenant-General Blake—as a legatee named in a former will—dated the 27th of February, 1826. An allegation had been given in on the part of the executor, to which three witnesses had been examined; but no interrogatories were addressed to them; and the cause had been set down for sentence on this day, as unopposed, when an application was made to the Court, on an affidavit of General Blake, to rescind the conclusion for the purpose of bringing in an allegation.

JUDGMENT.

Sir JOHN NICHOLL.

This is an application of a special nature to prevent the Court from proceeding to the immediate hearing of the cause. The cause having been assigned for sentence, the papers were all laid before me, ready for judgment, as in an unopposed suit.

The question arises on the will of the dowager Lady Blake. It appears that, though she had made a former will, she wrote instructions, and sent them to her confidential friend, Mr. Hugh Smith; and that she afterwards sent him further instructions—both which he transmitted to his solicitor, Mr. Harrison—who embodied them into a will; that, at an interview, on the 11th of January last, the will, so prepared by him, was read over, and, after some slight alterations, fully approved by her, except that as to two inferior legacies she entertained some doubts. She, however, kept the paper, saying, she could execute it afterwards; and she did execute it.—These facts, as well as capacity, and volition, are fully proved. On looking over all the papers and letters, I do not see the least ground for any suspicion of fraud, or imposition; and I should have been much surprised if—when the cause had been brought to me, it had not been marked as unopposed.

On this day, at this late stage, comes General Blake, and prays me to take the extraordinary step of rescinding the conclusion, and of allowing him to plead; I say the extraordinary step, because, though the Court is perfectly competent to adopt such a course; yet the application is very rarely made, and still more rarely granted:—If ever granted—it is only when all proper activity and diligence have been exerted, and on good and sufficient cause shown by affidavit, setting forth, that material facts had newly come to the party's knowledge. I hardly remember a case where

in a prayer of this peculiar nature has been granted without the facts, on which such prayer was made, being specifically and particularly stated—and without the allegation being absolutely tendered at the same time, so that the Court might see whether it could safely go to proof. Certainly this has been required and done in many cases. Now, under what circumstances is the present application made? General Blake has been a party through the whole of this suit; but it seems, from some reason or other, his proctor—previous to the month of August—declined to proceed further for him: a few days elapsed before he was informed of this—he then entered into a treaty with one of the legatees for a compromise; but how long that went on I do not know, or how it can affect the present question I do not see. Mr. Smith, the executor, was not a party to the compromise—he was bound to go on, and protect the other persons interested under the will; and not merely to acquiesce in the arrangements made between General Blake, and one of the legatees.

What, then, is stated in General Blake's affidavit?—that he has collected new facts since the 15th of October—but he should have done this when he undertook to oppose the will; it goes on—that he believes them to be very material,—but it does not say that he has laid them before his counsel, and that they so consider them: (and even this would not be sufficient, as the Court ought to be able to form its own opinion, and decide whether the facts are so far material as to justify it in again opening the cause, or of such a nature as to permit that step to be safely taken:) nor are the witnesses, proposed to be examined, enumerated. On such an affidavit is the Court now called upon to take this extremely dangerous and extraordinary step—contrary, in my opinion, to justice, and to those forms according to which this Court is bound to proceed. I can see no grounds for delaying my sentence; and, I therefore pronounce for the validity of the will, which the evidence fully supports; and I decree probate thereof to the executor.

The proctor for General Blake—being called upon by the Judge, preparatory to signing the sentence, declined to make any prayer:—The Court stated, that he might “pray justice” without prejudice to his right of appeal, and that it might be so taken down by the Registrar. This was accordingly done; and probate was directed not to go under seal for fifteen days.

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In the Goods of ALEXANDER RUSSELL.—p. 91.

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*On Motion.*

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An original will, disposing of real estate in Scotland, may (certain conditions being complied with,) be delivered out of the registry in order to be proved, and recorded at Edinburgh.

ALEXANDER RUSSELL, formerly of Edinburgh, but late of London, a surgeon in the East India Company's service, died in May, 1825. In June, 1826, probate was granted, by the Prerogative Court of Canterbury, to David Colvin, one of the executors named in the last will and testament, or deed of disposition, made by the deceased, and dated at Edinburgh the 2d of January, 1819, with three codicils. All the papers were in his own hand-writing.

The testator died possessed of heritable or real estate, and other property, in North Britain; and, by his will, disposed of all his property, both real and personal, to his executors, administrators, and intromitters upon trust. An affidavit now set forth, that, for the purpose of recovering such heritable estate, and of carrying the will or deed into effect in North Britain, it was necessary that the original will or deed of disposition should be recorded, and filed in the register books of council and session at Edinburgh; and that the same should there remain on record.

*Lushington* now moved, that the will should be delivered out of the registry of this Court, and an authentic copy left therein, on bond being given that the will should be safely deposited in the registry at Edinburgh, and that a certificate thereof should be transmitted to this Court.

THE COURT—having ascertained, that there was no suit depending here respecting the validity of the will, and having directed, that the transmission of the certificate should be strictly enforced by the bond,—granted the motion.

Motion granted.

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COLVIN v. H. M. PROCURATOR-GENERAL.—p. 92.

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*On Motion.*

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Administration of the goods of an intestate bastard, drowned, together with his wife and only child, will be granted to a creditor—the King's Proctor having been cited, but not the representatives of the wife, on presumption that the husband survived; and the debt being large, and the property small.

JOHN EDWARD CONWAY, otherwise Eugene Vendernesse, late a captain in the military service of the East India Company, died in the month of September, 1823, intestate, and a bastard. The deceased, who had been recently married, was drowned by the upsetting of a boat, with his wife and child [if any], in the river Ganges, as he was proceeding from Calcutta to join his regiment. At the time of his death, he was indebted to the house of Colvin and Co., agents at Calcutta, on bond dated 27th of July, 1823, for the payment of 1982*l.* sterling. The property of the deceased, in this country, did not exceed 250*l.* On an affidavit of James Colvin, one of the partners in the house of Colvin and Co., a decree, with intimation, issued against the King's Proctor, and no appearance being given by him,—

*Dodson* moved for a grant of administration of the goods (within the province of Canterbury) of the deceased to the said James Colvin, as a creditor, on giving the usual security.

*Per Curiam.*

THE COURT said—that, in strictness, the representatives of the wife ought to have been cited; but as the *primâ facie* presumption of law was, that the husband survived, and as the property was small, and the debt large, the decree might pass.

Motion granted.

In the Goods of the ELECTOR of HESSE.—p. 93.

*On Motion.*

The Court will grant, to the agent of a foreign Prince, an administration limited to substantiate proceedings in Chancery; but will not extend it to the receipt of a debt, without a power of attorney from the proper authorities.

On the by-day of Trinity Term last, *Lushington* applied for an administration to be granted to Nathan Myer Rothschild, as agent of the present Elector of Hesse, for the recovery and receipt, in the Court of Chancery, of a debt due to the late Elector from the estate of his late Royal Highness the Duke of York. The application was founded on an affidavit of Mr. Rothschild, which stated that he had received instructions from the present Elector to recover the debt.

THE COURT granted the administration limited to substantiate proceedings in Chancery; but declined to extend it to the receipt of the debt, without some fuller authority from the Elector of Hesse, or from his Minister of State.

A power of attorney from the Minister of State, executed by the directions of the Elector of Hesse; being now produced,—

*Per Curiam.*

THE COURT, on motion of counsel, revoked the former administration, and decreed a new administration limited to further proceedings in Chancery, and to the receipt of the said debt.

Limited administration granted.

INGRAM v. WYATT.—p. 94.

Interrogatories not being ready, and twenty-four hours having elapsed after notice, to the adverse Proctor, of the production of a witness; the witness has not, under all circumstances, a right to be dismissed.

Under suspicious circumstances, the deposition of a witness—not cross-examined—may be sealed up; but, on a subsequent, satisfactory, explanation, may be delivered out subject to all objections at the hearing.

After publication, the Court will not allow witnesses to be re-examined in the ordinary mode—on a suggestion that the examiner, from a mis-construction of the plea, has, improperly, rejected evidence: but, if essential to justice, it may direct a *utroque voce* re-examination in open Court.

An allegation, in this case, had been admitted, on behalf of Henry Wyatt, in May last. Six witnesses were examined, by commission, during the long vacation, and a seventh came up to London on Monday, November the 5th, from a distance of 160 miles, to be examined on the same articles. On that day, at half-past three o'clock, notice, that this witness would be ready to undergo his cross-examination in twenty-four hours, was served on the adverse proctor, who now stated that he had immediately procured instructions, and prepared a draft of some interrogatories, but was unable to get them settled, by counsel, till after the witness was repeated to his examination-in-chief on Tuesday night, which being done, he, immediately, left town, refusing to remain to be cross-examined.

THE COURT was of opinion that, under the circumstances, further time ought to have been allowed for preparing, and administering the interrogatories; and said—It would grant a monition against the witness to attend, and undergo his cross-examination, and should condemn the party, whose witness he was, in the costs of re-producing him, unless a satisfactory affidavit was brought in to explain why he was not examined on the commission, and why he left town before he was cross-examined.

The Proctor for Mr. Wyatt stated, that the witness had not been produced under the commission, because his residence could not be discovered; and that, even now, he did not know where he was to be found, nor how his attendance could be enforced.

THE COURT said—that such being the case, and the grant of monition, therefore, of no avail—its present impression was, that unless the witness was again brought up before the second session, at the expense of the party who originally produced him, his deposition should be sealed up in the registry, and not be used at the hearing; for it would be no injustice to the party to reject the evidence, if the other side were precluded from the benefit of cross-examination. Perhaps the address might be learnt from the Examiner; or the Registrar might be authorized to look into the deposition for that purpose.

The Court extended the term probatory to the second session, in order that the witness, William Lewes, might, in the mean time, be produced for cross-examination; and, if not produced, the Court directed that his deposition should be sealed up.

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On this day, a declaration of the Proctor himself, and also an affidavit of Henry Wyatt, his party, were brought in; and the Judge was prayed to rescind the order, or assignation, of the last court-day.

*Jenner*, in support of the application.

*Lushington*, *contra*.

*Per Curiam*.

THE COURT, no doubt, has the power of rescinding its former order, if,—on a different representation of the facts—it should appear that justice would not be done by carrying it into effect: but, on the view that the Court had of the circumstances on the last session, it was perfectly justified in making that order. I must premise that no imputation lies on the Proctor—no person is more correct in his practice, nor is there any one that stands higher in his profession—but the facts were such as created suspicion. The allegation was admitted in May last: a commission for the examination of witnesses had been extracted in the long vacation, and, under it, six witnesses were examined to certain articles: on the fifth of November only notice was given to the adverse Proctor that another witness was to be produced that day; and, at the expiration of thirty hours, he was repeated, and could not be prevailed on to stay till interrogatories were prepared. The general rule is, that twenty-four hours' notice shall be given for the preparation of interrogatories; but it does not follow that, on special occasions, the time may not be extended or abridged.(a) In the present instance, the hurried depar-

(a) Oughton, tit. 80, §§ 9, 10, 11, and the notes to those sections.

It was stated by an Examiner, in reply to a question from the Court, that though a witness was not repeated till after he had been examined on interrogatories, yet he signed his deposition as soon as his examination-in-chief was finish-

ture of the witness—coupled with previous circumstances—had the appearance of a contrivance that he should come up, and be examined, and his deposition be forced on the Court, without its effect being weakened by the answers extracted by interrogatories. Till the party had exonerated himself from such suspicion—strengthened, at the time, by the fact that the Proctor did not, even then, know the residence of the witness, and, not only, could not find him, but had no means of ascertaining where he was—the Court deemed it right to make the order now prayed to be rescinded. I thought, on the facts then before me, it would be extremely dangerous that such a deposition should be read, unless the party would reproduce the witness for cross-examination; and, therefore, ordered the evidence to be sealed up. Now, the affidavit of the party—for it is unnecessary to recur to the Proctor's statement after what I have said—is, that he is in no degree acquainted with the residence or address of William Lewes:—

“He took no measures whatever, either directly or indirectly, to delay, prevent, or hinder the said William Lewes from being examined on the interrogatories of the adverse party in this cause; that he has had no communication with him, either by person, or by letter, relative thereto; that at the time of the examination of the said William Lewes upon his allegation, he, the appearer, was at his residence in the county of Warwick; that he had no knowledge of the said witness having been examined, and repeated to his deposition, until he received a letter from his proctor desiring him to come to London immediately, to assist in endeavouring to discover where the said William Lewes is, for the purpose of procuring his attendance to be examined upon interrogatories.”

The party has thus exonerated himself from the suspicion of contrivance; yet I cannot help agreeing with the Counsel's observation,—that, under the circumstances, it would have been proper and expedient (because liberal conduct between the practitioners is always expedient) to have given, if possible, earlier notice to the adverse Proctor, that the witness was expected, in order that he might be prepared with interrogatories for a particular and full cross-examination. Yet I am willing to admit, that there is considerable weight in the excuse now offered, *viz.*, that it might have been dangerous to the witness' security, if it were known, that he intended to come to, or remain in London. Delicacy to him may be a sufficient excuse. Of that the Proctor must himself judge—I impute no blame; but, if it were not for these reasons, I should have thought an antecedent notice requisite. On the other hand, what has been the conduct of the adverse Proctor? As the allegation had been admitted long before—as, already, several witnesses had been examined—and, of course, interrogatories addressed to them, I can see no reason why some general interrogatories might not have been administered at the expiration of twenty-four hours; and notice have been given to the Examiner, and to Wyatt's Proctor, that an extension of time for drawing up further, and special, interrogatories would be asked. It was not necessary that he should wait till such special interrogatories were ready, before even the common form interrogatories were addressed to the witness. The Court can only add, that it could have wished, that on one side it had been practicable to give earlier notice, and, on the other

ed, and was not again allowed to see it. The Court said—that course was quite satisfactory; and it would also be desirable, if any material alterations were made at the request of the witnesses, it should appear, from the papers, that such was the case.

side, that some of the interrogatories, already settled, had been administered, and further time then prayed.

But what is the Court, at present, to do? Neither the Proctor for Mrs. Ingram, nor Wyatt's Proctor, now know where to find the witness: the name even of the friend at the Horse Guards<sup>(a)</sup>, through whom inquiry may be made for him, is not given. How, then, could the compulsory process be served? As some steps have been taken for the purpose of producing this witness; and as he may, possibly, attend before the next Court; as the facts, also, which have been disclosed, have removed all suspicion of contrivance from the party—I shall so far rescind my former order as to direct the deposition to be delivered out, and to be used subject—at the hearing—to all observations on its admissibility as evidence. I shall also direct publication to pass on the next court-day, with liberty to cross-examine the witness, William Lewes, if he shall, in the mean time, appear according to the notice which, I learn from the statement, has been forwarded to him. If he is so cross-examined, his deposition will, of course, be admitted; if he shall not appear, it will be for the Court to decide whether the deposition shall be read at all; and, if read, the Court—having all these circumstances now disclosed to its view—will be able to form a fair estimate to what degree of credit, and weight, his evidence may be entitled.

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On the fourth session (publication having passed on the preceding session), the Court was moved to rescind the conclusion of the cause, for the purpose of permitting the re-examination of Joseph Snow, and Edward Townsend Higgins, two witnesses already examined on certain additional articles to an allegation given in, on the part of Mrs. Barbara Ingram, and admitted on the 14th of July, 1827.

*Per Curiam.*

This is an application, on behalf of Mrs. Ingram, to rescind the conclusion of the cause, and to allow two witnesses to be re-examined, on the suggestion that the examiner had misconstrued the allegation. It is not necessary to call upon the Examiner to make any statement, as the facts appear on the face of the proceedings. An application that a witness, after publication, shall be re-examined, stands on very different grounds from a similar application before publication, and is open to far stronger objections. The Court would require very stringent matter, before it set up such a precedent; for under any circumstances, and in any mode, it would be a most dangerous experiment, leading to subornation, and improper extortion of evidence; more particularly, in a suit that has already been depending nearly three years, that has run to great length both in plea and proof; and where the parties in the country appear to be in such a state of hostility, as to vie in protracting the cause to the utmost possible limit.

(a) It appeared, from the Proctor's statement, that on the 12th of October, 1827, a letter from the brother of William Lewes communicated that William Lewes was travelling he knew not where; but that a letter addressed to a friend at the Horse Guards would reach him. To a letter thus forwarded, an answer arrived on the 20th, dated the 16th, but without a post-mark, in which the witness promised to attend, ten days notice being given him by the same means. His attendance was desired on November 5th, and, on that day, between 12 and 1 o'clock, he arrived, and wished to leave London the same evening, but was detained. The Proctor also, immediately after the last Court, had written to him, through his friend at the Horse Guards, urging his attendance; and to Wyatt, to assist in discovering him.

It is said, that the Examiner has misunderstood the allegation. It pleads in substance:—

That since the accession of John Clopton, the deceased, to his brother's property in May, 1818, and prior to the execution of the will<sup>(a)</sup>, Henry Wyatt, the party in the cause, was in the autumn of 1818, and in the following winter, and also at various times in 1819, and in 1820, in the habit of conversing with different persons on the subject of his first acquaintance with the deceased, and of the finding him upon the death of his brother, Edward Clopton; and often described his then state and condition; that, at such times, Henry Wyatt—in the presence of *Joseph Snow and Edward Townsend Higgins*—stated, that on going to London with his father to inform John Clopton of the death of his brother Edward, and of his accession to the Clopton estates, he, the said John Clopton, was then found in a garret in extreme filth; and that he was made fit to attend his brother's funeral by being dressed in a suit of clothes and a wig which had been worn by his late brother.

After further pleading—that Wyatt's father, (who wrote the instructions for the will,) had, during the same years, and in the presence of Higgins, made similar admissions as to the state and condition of the deceased, the article concludes:—

“That they, the said Henry and Richard Wyatt, in the course of such their aforesaid conversations, gave such representations of the general conduct, habits, and manner of the said deceased, as left no doubt in the minds of the persons to whom they were so given, that the said John Clopton was a person of weak and imbecile mind, and was so considered and treated by the said Henry Wyatt himself, and by his father.”

In strict interpretation, the words taken separately have been rightly construed, though from the context, it would appear that, probably, they were not intended to be thus limited: but the pleading should have been so constructed as to be unequivocal; which might have been effected by adding a few words. The ambiguity, I have no doubt, would have been avoided, if the Proctor had not, at the time of bringing in his allegation, been required—under the special circumstances of the case, immediately—in Court, to insert in his plea, the names of the witnesses in whose presence it was intended to prove that the conversation passed. This slight and formal error might thus easily have arisen. But, perhaps, considering the whole article together, the true meaning, even now, is not that which has been attributed to it; and if the construction of an article be doubtful, an Examiner would act more prudently in taking the evidence down, and leaving it to the Court to reject it afterwards—if extra-articulate.

I cannot, however, see what possible advantage can arise from a re-examination to declarations, made eight years ago. Higgins says, he cannot at this distance of time remember what passed:—

“To the best of his recollection, and as he has no doubt, he never heard Henry Wyatt say any thing about the deceased in this cause, *in the presence of Joseph Snow*: he remembers that, on some occasions, when Richard Wyatt was dining with the deponent, he spoke of the deceased; but, after all due consideration and reflection, he is unable to

(a) The will propounded was dated on the 21st of August, 1821; and a codicil, also propounded, bore date the 3d of August, 1822.

call to mind, with any accuracy or certainty, what Richard Wyatt so said. He has no recollection at all of any particular time when Richard Wyatt said any thing to him on the subject of the deceased, and his recollection of what Richard Wyatt may have said, and did say to him at any time, is so very imperfect and indistinct, that he cannot undertake to depose thereto, either to particular expressions, or the general nature and effect thereof."

There could, then, be no use in again examining him; and it has been remarked, that, from his own observation, he has spoken strongly in support of sanity:—On the 15th interrogatory he says, "he did consider and treat the deceased as a person competent to do acts of business, and to enter into legal engagements affecting his property;" and the question is not, in what state the deceased was at the time of his brother's death, but, at the time of making his will.

Snow admits conversations were held:—

"While on a visit to Henry Wyatt in the early part of the year 1820, the said Henry Wyatt did occasionally, when sitting with the deponent after dinner, speak to him on the subject of his first acquaintance with John Clopton, and of the state in which he found him after the death of his brother Edward; but *Edward Townsend Higgins was not present* on any such occasion."

It is not probable that Wyatt would make declarations asserting his own fraud, and the deceased's incapacity; and the party's answers to this allegation have been brought in. To re-examine, then, to recollections of conversations taking place in the ordinary intercourse of society, and passing eight years ago, would be quite nugatory. It is scarcely possible to suppose that it could bring out material evidence: with the mass of depositions already before it, it is not to be expected that such matter could have any influence on the decision of the Court. At all events, the present application is of so very extraordinary and dangerous a nature, that it certainly would not be consistent with due precaution to grant it in its present shape. The case, however, I presume, is just ready for hearing, though I know not whether it is intended to give in an exceptive allegation. Should, therefore, the Court—against whom the cause is never concluded—find, at the hearing, that the facts are so very nicely balanced, that its decision may turn upon such evidence of loose declarations—made after dinner—it will not be precluded from admitting them, if necessary and essential to justice. But in that case, I should, probably, adopt a course, not very usual, but not, altogether, unprecedented—of issuing a monition to the witness to appear, and undergo a *vivâ voce* examination in open Court, when his answers might be taken down by the Registrar. That would be the only safe way—and which the Court is fully competent to adopt.

At present, I reject the motion, reserving the question, as to the costs of making it, to the final hearing when I shall see the whole case.

Motion refused.

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KENNY v. JACKSON.—p. 105.

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*On Motion.*

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An inventory and account may be demanded of an executor by a residuary legatee, who has given a release.

ANN WHITEHEAD, after bequeathing, by her will and codicil, certain legacies, amongst others to Barnard and Mary Kenny, directed the residue of her effects to be divided between Barnard and Mary Kenny, and appointed the Reverend Thomas Jackson, and Algernon Wallington, executors.

On the 22d of March, 1822, this will and codicil were proved under 16,000*l.*, in the Prerogative Court, by Mr. Jackson,—the other executor having renounced. A citation had since been served, at the instance of Barnard Kenny, one of the residuary legatees, upon Mr. Jackson, for an inventory and account; who prayed to be dismissed, on exhibiting a release, signed by the two Kennys, as well for their legacies as for the residue. The release was dated on the 11th of December, 1823, at which time, it was stated, Barnard Kenny was a minor. The amount of the residue did not appear.

*Lushington*, in support of the motion.

*Dodson*, *contra*.

*Per Curiam*.

It is, I consider, a matter of duty for an executor to deliver an inventory and account, when properly called upon for that purpose; and, in order to exonerate himself from all liability, it is always most prudent to exhibit it before a final settlement. This Court will not enter into the question—how this release was obtained, nor whether it is valid—It cannot judge of, nor notice such instruments. Barnard Kenny, when he executed the release, was certainly, a very young man—even if he had attained his majority, and having now, as one of the residuary legatees, demanded an inventory and account, they must be produced without delay; they may, perhaps, be the means of discovering an unfair settlement; while, on the other hand, if the executor has been vexatiously cited in this matter, he may be able to obtain relief in another Court; but, in this Court the release cannot avail him—it is no bar to the present claim.

Inventory and account ordered.

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COLVIN v. FRASER.—p. 107.

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(*On Motion*.)

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A next of kin, contesting a will propounded by an executor, may take out a decree citing all persons, interested under the will, “to see proceedings.”

JOHN FARQUHAR, late of Fonthill Abbey, died on the 6th of July, 1826; and, on the 15th of December following, letters of administration were granted to John Farquhar Fraser, his nephew, and one of the next of kin, on the suggestion that the deceased had died intestate. That administration had since been called in, upon a decree to show cause “why a probate of the will and codicil of the deceased, or of an authenticated copy thereof, under seal of the Supreme Court of Judicature at Fort William in Bengal, should not be granted to David Colvin, one of the executors therein named.”—The will and codicil were respectively dated on the 7th of March, 1814.

*Phillimore* and *Lushington*, for the next of kin, now moved the

Court to direct decrees, (by letters of request, if necessary) to see proceedings, to be issued against the several surviving executors, and all parties interested under the said will and codicil.

*Dodson*, for the executor, submitted, that the course proposed to be pursued was novel, and would be attended with great expense and delay, from the very numerous legatees whom it would be necessary to serve in Scotland; and that it would lead to no beneficial result, inasmuch as all the parties under the will would be bound by the acts of the surviving executor.

JUDGMENT.

SIR JOHN NICHOLL.

This is an application, at the instance of a next of kin—himself called upon to see a will and codicil propounded—for a decree against all persons interested under the papers, either as legatees or otherwise, to “see proceedings,” as it is technically expressed. Certainly, in the usual course of practice, such decrees issue only against the next of kin of a testator, and at the promotion of the executor, or of the person propounding a will. But in the case of *Calder v. Calder*, which occurred here in 1792, the party obtained a decree against all persons in general to appear, and propound a will—that case arose upon a change of circumstances in the testator, occasioned by his marriage, and the birth of a child. The application, then, is not unprecedented; and the present case is under very special circumstances. A will, which was executed in the East Indies, so far back as the year 1814, is now attempted to be set up, and the ground of opposition is, as I understand, that it has been revoked. And although it is true that the act of the executor—being the appointee of the deceased—would, to a certain extent, bind all persons interested under the will; yet some party might, perhaps, at a future time, allege collusion. It is, therefore, highly expedient, in a case of this nature, to pursue the course which is proposed; particularly as the grant of the decree cannot occasion any prejudice to the adverse party; for the inconvenience, if any, will fall upon the next of kin who make the application.

The Court directs the decree to issue; and recommends that, as some of the legatees may happen to be dead, care should be taken to cite their representatives: the decree should be framed in the largest terms, against all persons in general.

Motion granted.

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### BURROWS v. BURROWS.—p. 109.

Instructions for a will containing the fixed, and final, intentions of the deceased are valid, if the formal execution is prevented by death: and, if there is no evidence of insanity, at the time of giving the instructions, the commission of suicide, three days afterwards, will not invalidate the paper by raising an inference of previous derangement.

BENTLEY BURROWS died on the second of April, 1827, leaving behind him a widow, the party in this cause,—a mother—three brothers—two sisters—and eight nephews and nieces, the children of a deceased brother, and sister. His property was of the value of 2860*l*.

The widow propounded, as his last will, an unexecuted paper, in the

form of instructions; which was opposed by Thomas Bentley, one of the brothers, who prayed the Court to pronounce that the deceased was dead intestate.

*Lushington and Dodson*, for the widow.

*Addams and Salusbury*, *contra*.

JUDGMENT.

Sir JOHN NICHOLL.

Two points have arisen in the course of the argument. The first—whether this unexecuted paper is sufficiently sustained by circumstances to be the last intention of the deceased. The second—whether its validity is not affected by his insanity. In respect to the first point, it is a principle well known here, that if unexecuted instructions are proved to embody the fixed and final intention, which instructions the deceased was prevented reducing into a more regular shape only “by the act of God,” or by some unexpected circumstance, that then they will have the same force as a complete and formal will.

On Friday, the 30th of March, 1827, the deceased went to his solicitor, Mr. Scott (whom he had before employed,) for the purpose of giving instructions—this evidences the *animus testandi*, and that it originated with the deceased himself: he gave those instructions fully, except as to the names of the executors; his primary object was to bequeath every thing to his wife for her life—on that point he manifested no hesitation, but he doubted about the mode of dividing the remaining interest among his large family. Mr. Scott, on the first article of the allegation, thus relates what passed:

“On returning to his offices about 11 or 12 o’clock in the forenoon of Friday, the 30th of March, he found the deceased waiting there to see him: that, after some conversation, the deceased said he wished to know his, the deponent’s, charge for making a will. The deponent replied that it depended on the trouble taken, and that it might be very little, or it might be much. The deceased then observed, ‘Well then, we’ll say no more about that.—I wish to make my will,’ or to that effect; and then proceeded to give him instructions, making observations thereon, as he proceeded: the deponent thinks that the deceased first remarked, ‘that he had deferred making his will for some time, but was then determined to do it.’ ”

This, then, was no hasty thought, but a premeditated and decided purpose.

“That he had so many nephews and nieces that it puzzled him how to leave his property so as to satisfy all parties.”

It does not necessarily follow, I think, from this, that he intended to leave something to each of them—that itself might produce dissatisfaction, nor can any inference be deduced from it, that he might not, intentionally, omit his brother Thomas, or the children of his brother William; for Algar, to the third interrogatory, answers:—

“The respondent never heard the deceased express any regard or affection for his brother Thomas, or for any of the children of his deceased brother William. She never saw any of them in company with the deceased at his house, but has often seen his other relations there.”

Trigg’s evidence, on this interrogatory, is to the same effect.

“The respondent never heard the deceased express, at any time, any particular regard or affection for any of his brothers or sisters, or for any of their children. He never saw the deceased in company with any

of them, except his brother David and Thomas Carter, and to them he behaved in a very friendly manner."

But, even supposing these omissions to have proceeded from want of recollection—that would not be of sufficient importance to render these instructions a nullity.

Scott proceeds with his account:—

"The deponent proposed, that the deceased should tell him what his property was, and begin with the freehold. The deceased assented; but observed, at the same time, that his wife was to have all for life. He then proceeded to take down the devise for life of the freehold property to the deceased's wife, and, on inquiring of the deceased to whom the freehold was to go at his wife's death, the deceased mentioned the names of several of his brothers and sisters."

The deceased then, minutely and regularly, described the particulars, and what disposition he wished to be made of the leasehold property, then of the funded, and then of the residue.

At length the instructions were concluded; they were read over, and approved by the deceased, who directed that a draft should be prepared: no doubt, therefore, can exist that they were final, as far as respected the disposition of his property, and that they only wanted the names of the executors to render them complete. The same day, Triggs, an intimate friend, called upon and sat with him the whole evening, and in the course of conversation the deceased observed to him:

"He had been giving instructions, that day, to Mr. Scott, his solicitor, about his will, and asked the favour of deponent to be his executor; he told him he would. The next morning he received a message from the deceased, that he wished to see him again, who then described to him the instructions he had given to Mr. Scott, and requested the deponent to look over the deeds relating to his property, which he produced from an iron chest; and deponent looked them over, and found them correct.

This witness does not suggest that any change of intention was expressed, on the part of the deceased, during this interview; he only seems to have doubted whether his property was correctly described, and, being convinced of that fact, he was satisfied.

The draft was directed to be ready on Monday, the 2nd of April. About four o'clock in the morning of that day, that is, before the time appointed for the deceased again to go to his solicitor, he died; and thereby was prevented from carrying his intentions into effect. These facts, then, are sufficient to render the instructions valid, and entitle them to be considered as his will. After they had been read over, and approved, and the draft ordered, there is no reason to presume a change of intention—the act was in progress, the formal execution alone prevented. As an unexecuted paper, therefore, it is sufficiently supported, unless its validity is affected by extrinsic circumstances.

This leads me to the second point—whether its validity is affected by insanity on the part of the deceased—that is, whether he was incompetent to do a testamentary act, as it is admitted that he died by his own hand. Now sanity must be presumed till the contrary is shown. Before actual derangement takes place, its approach is generally notified by agitation, and nervous excitement. Algar, a young girl, to whom I have already referred, gives the following evidence:

"Deponent thought the deceased not quite so well in his mind shortly before Mr. Triggs came on the Saturday morning, but he appeared to

have recovered again by the time Mr. Triggs had arrived. About eight o'clock that morning the deceased was walking about the room apparently agitated, and talking wildly; but he came down stairs shortly afterwards to breakfast, and then appeared more composed. He was silent at the latter time. Except, as just deposed, the deceased, at both the times of Mr. Triggs calling upon him, well knew and understood what he said and did, and what was said to him."

It would be going too far to say, that this is proof of actual derangement—even for the short time that this agitation continued—and this too, was subsequent to the giving of the instructions. On Friday, and Saturday, he conversed with his friend Triggs: he repeated, as I have before said, the instructions; he asked him to be his executor; and Triggs saw no appearance of insanity, for he thus deposes to the third article:—

"Deponent went to the deceased about nine o'clock on Saturday morning, the 31st of March, and remained with him, on that occasion, about an hour and a half or two hours: that upon both occasions of his seeing and conversing with the deceased, he, the deceased, was of sound mind, memory, and understanding. He conversed quite rationally and sensibly, as much so as he ever did in his life, and perfectly knew and understood what he said and did, and what was said to him. He was as collected as ever the deponent saw him in all his life."

Mr. Scott, the solicitor, speaks to the deceased's capacity, at the time of taking these instructions, in his deposition on the second article:—

"The deponent considers the deceased to have been of sound mind, memory, and understanding during the transaction. There was nothing in his manner or deportment which led the deponent to doubt his competency to give the instructions for his will, which he did give. His manner was rather hurried, and somewhat agitated; or, rather, what is more generally termed, flurried, which the deponent attributed to the occasion; and to his being, what is termed, a nervous man. Sometimes, when about to answer the deponent's inquiries, he appeared a little embarrassed. There was, however, nothing irrational in his conversation or deportment; but he discoursed rationally and sensibly, and appeared to the deponent well to know and understand what he said and did, and what was said to him. The deponent considers him to have been fully capable of giving instructions for, and of making and executing, his will."

On the evidence, then, to which I have referred, and with no attempt to show any thing to the contrary, it is impossible to hold that this act should be invalidated on account of insanity; and I, therefore, pronounce for these instructions as containing the will of the deceased.

An application for costs, out of the estate, was not objected to, and was granted.

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### HUBLE v. CLARK, formerly HORNER.—p. 115.

When a testamentary paper is asserted to have existed since the death of the alleged testatrix, and to have been subsequently destroyed; these allegations must be proved by the clearest and most stringent evidence.

THE nature of the case set up, in this suit, is sufficiently explained in the following affidavit of Mrs. Clark—the party in the cause:—

"That she was a niece of the deceased, and resided in her house, and

attended upon her; that a few days after her death, but previous to her funeral, Huble, the deceased's son, came to the house, and went into her bed-room, where he remained a considerable time: that, on coming out of the room, he informed the appearer that the deceased had told him, 'that she had placed in a drawer or box in her bed-room a paper or papers containing bequests or legacies of *certain articles* to her, the appearer, and another niece, to a nephew, and also to a sister of the deceased; that he had searched in the room, and could not find either the paper, or some money, of which his mother had informed him.' That she, being much surprised at this communication, and anxious to find the paper, immediately after Huble had left the house, requested Mrs. Prior, who also resided in the house, to make a further search in the same room; and that they found in a box (where the deceased kept her dresses) under the bed, a paper in her own hand-writing, in which she gave to her sister, Elizabeth White, 100*l.*; to her, the appearer, and to Maria Brown, another niece, 60*l.* each; and to her nephew, Samuel Horner, 40*l.*; that the paper was wrapped up together with four separate rolls of notes, of 10*l.* each respectively corresponding to the bequests, and amounting in all to 260*l.*; that she, the appearer, replaced the whole in the box in the same state in which she had found them. That, in a day or two, Huble again made a further search in the bed-room, after which she asked him 'if he had found what he was looking for'—when he replied—'not exactly, but I dare say it will be all right;' and shortly afterwards he went away, apparently satisfied. That after the funeral, Huble, the appearer, and others of the relations of the deceased, met together, and Huble then informed them of his having found the testamentary paper with the several bequests, but stated the amounts respectively to be considerably under what she well knew to be the actual sums, in consequence whereof she immediately disclosed, that, together with Mrs. Prior, she had previously found and perused the paper, and examined the bank-notes, as before set forth, and then enumerated the bequests, in contradiction to Huble's statement; that Fawcett, his solicitor, was present, and admitted Huble was in possession of the testamentary paper, and, taking a card from his pocket, read therefrom the several bequests, agreeably to the statement made by Huble, whereupon she demanded of Fawcett the production of the paper, who replied, that he had left the same at home, but that it should be produced; that she has never since seen it; but believes it now remains in the hands, custody, possession, power, or control, of Huble or of Fawcett."

This affidavit was sworn on the 23d of November, 1826; and, on the same day, (being the 3d session of Michaelmas Term,) it was brought into the registry, and the Court, on the application of a proctor, on behalf of Mrs. Clark, decreed a monition against Huble, and Fawcett, to bring in the paper; who, in their respective affidavits, made oath "that no paper, or testamentary disposition of the party deceased, had, at any time whatever, come to the possession, or knowledge, of either of them." (a)

(a) In the case of *Colvin v. Frazer*, [*ante*, 48,] on an objection to an affidavit of Harry Phillips, "that no testamentary paper of the deceased (Mr. Farquhar) had, at any time, come to his *hands* or *possession*, or now is under his power or control;"—

The Court pronounced the affidavit insufficient, as it did not proceed to state—that no such paper had come "*to his knowledge*."

*Lushington*, for Mrs. Clark.

*Dodson*, *contra*.

JUDGMENT.

Sir JOHN NICHOLL.

This is a case of no very common occurrence. A testamentary schedule has been propounded—which has not been produced, but is alleged to have been in existence at the time of the deceased's death. It has been propounded on behalf, and as contained in the affidavit, of Mrs. Clark—a legatee under it, and a niece of Sarah Huble—the party deceased; whose son and only child—William Huble—has opposed it. She died on the 22d of September, 1825, but no steps were taken to institute this suit till Michaelmas Term, 1826.

The first article of Mrs. Clark's allegation thus states the history of the deceased. That she was a widow, leaving an only child—who would solely have been entitled to her estate, if she had died intestate.

The second article thus proceeds—"that Sarah Huble, having an intention to bequeath certain legacies to her sister, Elizabeth White, to her two nieces, Elizabeth Horner and Maria Brown, and to her nephew, Samuel Horner, wrote on a slip of paper, 'Sister White 100*l.*, Elizabeth Horner 60*l.*, Maria Brown, 60*l.*, Samuel Horner 40*l.*'—and she wrapped the same in paper with four rolls of Bank of England notes, of the value of ten pounds each respectively, corresponding, in their amounts, to the four legacies, and making in the whole, the sum of 260*l.*; and deposited them, so wrapped up, in a box (under her bed,) in which she kept her dresses."

If this allegation be proved, such a paper, accompanied by the bank-notes, would be of testamentary validity. But it would require the most stringent evidence to establish a paper which is not forthcoming, which is not supposed to have been lost, nor suggested to have been destroyed by accident, but of which Mrs. Clark directly charges a fraudulent suppression by the son. Unfortunately on one side or on the other, there must have been fraud and falsehood; but at all events, when a party imputes such iniquitous conduct, he must be prepared to support his case by clear and indisputable evidence. Three witnesses have been examined on either plea, and the answers of both parties have been taken, but have not been read. It is most material, however, to inquire what has been asserted—what admitted—what denied—and what proved.

The third article of Mrs. Clark's plea goes on to allege—"That Elizabeth Horner lived in the same house with the deceased, and attended upon her, for some time, previous to her death; that after the deceased's death, but prior to her funeral, Huble went into the deceased's bed-room, where he remained a considerable time; and, on coming out, informed Elizabeth Horner that the deceased had stated to him that she had placed in a drawer, or box, in the bed-room, papers containing certain legacies for her and another niece and nephew, and also for a sister of the deceased; but that he had searched in the room, and could not find either the paper, or the money, which his mother had informed him of, and he then left the house."

Of this most important declaration of Huble there is no proof whatever: only one witness has been examined to the article, Mrs. Prior, the mistress of the house where the deceased lodged; and she thus concludes her deposition on this article—

“That she knows not what conversation took place between Huble and his cousin, the said Elizabeth Clark.”

She, therefore, does not prove the declaration. The answers have not been read; the Court, then, presumes that they deny it; and Huble's allegation positively contradicts the fact.

The fourth and fifth articles plead the finding, and hand-writing. The fourth is to this effect—“That Horner, being much surprised at Huble's communication to her, proceeded with Mrs. Prior, who resided in the house, to the deceased's bed-room; that after searching some time, they found the testamentary paper, with the bank-notes [as described in the second article;] that they perused the paper, and counted the notes, and replaced them in the box in the same state in which they were found.”

Now this is a very material part of the case; and, on these articles, again, Mrs. Prior is the only witness. She is far advanced in life, being seventy-six years of age; her eye-sight is bad; on looking at the signature to her deposition, it appears as if she could hardly see to write her own name, for it is scarcely legible. She admits, in answer to the eighth interrogatory, that there had been some differences between her and Huble about the rent, and some articles of furniture; that though she was not angry with him, there had certainly been some differences of opinion—not amounting to a quarrel. She deposes, very minutely and circumstantially—though the particulars, to which she speaks, had passed a year and a half before her examination. She had also made a voluntary affidavit in this cause—perhaps, under circumstances, rendering this not an improper step, (a) yet it might have left some impressions on her mind which it would be difficult for her to shake off. However, in my view of the case, there is no absolute necessity to impute to her any falsehood; because, supposing all that she says to be true, it furnishes no proof that the paper is genuine; nor does she connect it fully with the deceased.

The parties in the cause, the sister and nieces, were in undisturbed possession of the deceased's apartments, keys, and repositories, for some days before the son's return, on the Saturday evening, from York. It appears that, on his arrival, he made a search in his mother's drawers, and not finding what he expected, he was either disappointed or dissatisfied. Fawcett, Huble's solicitor, thus answers to the sixth interrogatory:—“That Huble informed respondent of his having searched in a drawer of the bureau in the deceased's bed-chamber, where she usually kept her money, and of his having found about fifteen pounds therein, and he expressed great dissatisfaction at only finding such sum, as he said that, upon leaving town, four or five days before his mother's death, he had asked her to lend him five pounds, and that she had sent him for her bag to the bureau, and he had there seen a roll of ten pounds and five pounds, bank notes, which he thought, from their appearance, exceeded 100*l.* in value:—that, on a further search, he had found a further sum of money in a box under her bed, of the amount, to the best of respondent's recollection, of 200*l.* or thereabouts.”

It is not impossible that the money might have been previously subducted by those who had the keys; and on the expression of this dissatisfaction, have been restored to the box with some scraps of paper, which

(a) The affidavit—sworn before a Surrogate of this Court—was taken, under the advice of counsel, on account of the age, and extreme bodily infirmity of Mrs. Prior.

were both written and placed there by other hands than the deceased's, and for this there was abundant opportunity. What was the course of events? No sooner was the son's back turned, than the parties called up Mrs. Prior to be present at the search; and the object of their inquiry was discovered under the bed in a box, in which were the deceased's best clothes, and some of her nieces' clothes also. And to the hand-writing, this old woman, of low education, who had never seen the deceased write, who can scarcely write legibly herself, and who never had the paper in her own hand, is the only witness. She grounds her opinion on the similarity of the hand-writing of this paper to the washing bills written by the deceased, which she had seen; and she also assigns another reason; that the sum mentioned in the paper, corresponded with the amount of the money found in bank notes; but this latter coincidence would have equally appeared, if the paper had been supposititious.

If the case rested here, and there had been nothing further to verify the existence, and the authenticity of this alleged instrument, I should have felt it my duty to have pronounced that there was a failure in proof. Upon such evidence alone of hand-writing, and finding, the Court could not, with any safety, conclude, that a document of this nature, and proceeding from the deceased, had ever existed since her death. But still it may be supported by other evidence; and, if it could be shown, as alleged, that either the son, or his solicitor, had distinctly admitted that there had been such a paper, or any paper in the hand-writing of the deceased, the whole character of the case would be changed. For then, a paper being admitted to have existed, and being traced to the hands of the son, if he did not produce, but suppressed it, under a pretence that it was lost, or mislaid, the Court would presume every thing against him as to the contents. It would listen to no suggestion of a smaller sum, but would adhere to the highest amount, as spoken to in the deposition of Mrs. Prior.

But how does the evidence stand? It is alleged, in the sixth article:

“That in a day or two after the search made by Huble in the deceased's bed-room (but before the funeral), he made, or pretended to make, further search for the paper and money which she had informed him of; that, on his coming from the room, Horner asked him, whether he had found what he was looking for, to which he replied, ‘not exactly, but I dare say it will be all right;’ and he shortly afterwards went away, apparently satisfied. It then expressly pleads, ‘that at such time Huble found the said testamentary paper with the bank notes, took possession of the whole, and carried them away.’

First, there is not one single witness examined on this article; and secondly, as the answers have not been read, I presume they deny it. The story itself is not very consistent with probability: as the son had been before disappointed, when he returned, why did they not announce that the money and paper were discovered? If even they had felt conscious of some indelicacy in examining the deceased's box during his absence, the successful issue of their search would have been, in some degree, their justification. Finding this considerable sum, and a paper pointing out how it was to be disposed of, they would surely have communicated it to Huble. If the whole of this story had been true, *that*, without doubt, would have been the most natural course, and thus all the difficulty would have been removed, and their legacies secure. But

they do nothing of the kind: they suffer Huble to make another search by himself—he does not tell them the result, and they allow him to go away without any acknowledgment of having themselves found the money, or the paper; and without requiring, or giving, any explanation. This, surely, is quite unaccountable, and adds to the incredibility of the story.

The other circumstances make the case still more suspicious. It is pleaded in the seventh article:—“that immediately after the funeral, Huble, Horner, and other relations, and Fawcett, the solicitor, met at the deceased’s house; that Huble then distinctly communicated to them the fact of his having found the testamentary paper containing the several bequests, but which he, at the same time, stated to be—to Elizabeth White 80*l.*, to Elizabeth Horner and Maria Brown 40*l.* each, and to Samuel Horner 20*l.*; whereupon Elizabeth Horner immediately disclosed to Huble the fact of her having, together with Mrs. Prior, searched for, and found and perused the said paper, and examined the bank notes wrapped up therewith, and stated the actual amount of the several bequests, in contradiction to Huble; *that* Fawcett then distinctly admitted that the paper was in his possession, and taking a card from his pocket, read therefrom the said several bequests, corresponding, in amount, to those mentioned by Huble; that Elizabeth Horner then demanded the paper of Fawcett, who replied, that he had left the same at home, but that it should be produced.”

Upon this article, again, there is not a tittle of proof—not a single witness has been adduced to speak to it—the answers have not been read. But there is not only an absence of proof respecting these admissions, but they are absolutely disproved. Fawcett and two other persons, Phillips a relation, and Rudland, who were present at the funeral, and remained to dinner, negative the article. The two latter deny that any such conversation passed in their hearing; and Fawcett, who is vouched as distinctly admitting the existence of the paper, does distinctly, upon oath, deny, not only the admission, but the fact, that any such paper was ever produced to him; or that Huble ever acknowledged to him its existence. Mrs. Prior’s answer to the eighth interrogatory also proves, that Mrs. Clark complained, as soon as the funeral was over, that Huble had declared that there was not a scrap of paper left by his mother. This shows, from the mouth of an adverse witness, that, whenever the assertion was made, there was also a most clear and positive disavowal on his part. So stands the evidence in respect of what is pleaded to have passed after the funeral.

The eighth article goes on to plead further admissions of Fawcett, on several subsequent occasions, as to the existence of the paper, and that it had been in his possession; and that, on one occasion, he read from a memorandum, the amount of the legacies, but making the amounts, respectively, considerably less than those actually bequeathed by the deceased; that he said he was authorized by Huble to offer payment of those sums respectively to the legatees, which they refused; and it being stated, that they would not be satisfied with less than the full amount of the bequests intended for them, Fawcett remarked, “then there is one hundred pounds at issue,” or expressed himself to that effect. To these, two witnesses are produced, Stead and Black, who, impressed by their friends, the two nieces, with an idea that the paper gave higher sums, called on Fawcett in order to remonstrate against the

smaller; but neither witness ventures to assert that Fawcett distinctly admitted that there was any paper,—it is highly improbable that he should have made such an acknowledgment, and they might easily have misapprehended the extent of what he said. He swears, positively, that no such paper was ever referred to; but he admits that the deceased had left her son instructions to give these persons something; but trusted the amount to his discretion; and that the son wrote their names down with blanks for the sums; and, afterwards, on consultation with the witness, as to what would be reasonable, he agreed to give the sister 80%, and the nephews and two nieces 20% each; that the witness copied these sums on a card—and that is the only paper, and the only sums, which ever existed.

The whole evidence beyond the hand-writing, and finding, bears strongly against the paper: not only is it not proved, but the charge of suppression, and the alleged admissions are, to a great extent, disproved, and are most solemnly denied. I am bound, therefore, to pronounce that Mrs. Clark has failed in proof of the testamentary schedule.

The question of costs still remains behind,—perhaps, where a party undertakes to propound such a paper and fails, and, still more, when she charges fraudulent suppression, on the part of a son, it would usually be a case for costs. I shall, however, abstain from giving them in the present instance—considering the near connexion of the parties; and that the deceased certainly intended to give these relations something, though she left the amount to her son's discretion. He, probably, by withholding his purposed bounty, has the power in his own hands of protecting himself against the expenses of this suit; but I am by no means convinced that strict justice would not require that Mrs. Clark should be condemned in costs.

Administration decreed to the son.

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MEEK and DONALD v. CURTIS.—p. 127.

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*On Motion.*

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A next of kin declaring “he proceeds no further” in contesting a will; the Court will dismiss, and not condemn, him in costs, because it *is pleaded* “that he attempted to suborn an attesting witness:” nor allow affidavits in proof of the attempt.

A married woman—living apart from her husband—being joined in the probate of will (authorizing her “to act as executrix, in all respects, without her husband”) but not having intermeddled: the Court—on the Bank refusing to transfer stock without the husband—will revoke such probate, and grant it to the remaining executors.

CHARLES CURTIS died on the 7th of October, 1827. His will, duly executed, was opposed by John Curtis—the deceased's brother—and next of kin, who, on the fourth session of this term, declared that he would proceed no further. The present application was to condemn him in the costs incurred by his opposition, on the grounds pleaded in the fourth article of the allegation propounding the will:—viz. “that John Curtis, in order to invalidate the last will of the deceased, hired or employed ———— to prevail upon or induce ———— (whose name is subscribed as a witness to the said will) to swear and depose in this

cause contrary to the truth and fact; that he offered him 100*l.* if he would swear the deceased was of unsound mind at the time of executing his will; and that he, subsequently, renewed his endeavours: and that finding his efforts to suborn him ineffectual, he—the said John Curtis—did, on the 12th of November, attend at the house of the said witness,—when he recognized and repeated such promises; and offered to the witness, as a further inducement, a sum of 150*l.*, in addition to the 100*l.* already proposed, if he would swear in manner hereinbefore pleaded.”

*Lushington*, in support of the motion, prayed costs against the next of kin.

*Dodson, contra*, that he might be dismissed—each party paying his own costs:—the charge imputed in the allegation is not proved.

*Per Curiam.*

How can the Court assume the guilt of this person? The charge—as far as this Court is, at present, cognizant of it—rests solely in plea; for no evidence has been taken upon it: it is a very heavy accusation, and may be a fit subject for a prosecution, should the executors incline to resort to another tribunal. It does not necessarily follow that the party withdraws his opposition on any apprehension arising from this charge, there may be other grounds to induce him to retire from the cause. If, indeed, the plea had been established by proof, then he would have become liable to the costs; on the whole, the Court recommends the executors to take probate, and go to another jurisdiction.

The Proctor for the executors then applied to be heard, on this question of costs, by act on petition with affidavits: but the Court, after observing that such a mode of proof was unsatisfactory, rejected the application.

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On the 22d of December, probate of this will—the subject of the previous question—was taken by Richard Meek, Samuel Donald, and Elizabeth Benland (wife of Benjamin Benland), the executors; but, on an application being made by them, at the Bank of England, to have some stock—standing in the deceased’s name on their books—transferred, the Bank required Benjamin Benland to join in the transfer, notwithstanding the will bequeathed to Mrs. Benland the property “for her sole use and benefit, independent of her husband;” and a clause authorized her “to act as an executrix, in all respects, without her husband.” Under these circumstances, an affidavit, as sworn by the executors, was now exhibited, stating these facts; and further, that Mrs. Benland had been separated from her husband for six years; that she had not intermeddled in the deceased’s effects; that no suit, either in law or equity, had been commenced against, or by, the executors, in respect to the said estate; and that it was necessary, for duly carrying into effect the testator’s will, that a transfer of his stock should be made.

Upon these facts, the Court, on motion of counsel, revoked the probate already granted; and decreed a new probate to Richard Meek and Samuel Donald, with a power reserved to Mrs. Benland.

## MANLY v. LAKIN.—p. 130.

*(On the Admission of an Allegation.)*

Letters containing final testamentary intentions, are valid as a will, the deceased considering no further act necessary; nor will they be invalidated by the deceased not having subsequently disposed (as she then purposed) of a small part of her property.

MARY MANLY, the deceased in this cause, died on the 27th of July, 1827, leaving two letters, respectively marked A, and B, which were propounded, as, together, containing her will, by her brother James Manly; and opposed by Sarah Lakin (formerly Mason), and by her three brothers, the children of a deceased sister—the only other persons entitled in distribution to her personal estate. The substance of the allegation, in support of these papers, sufficiently appears from what fell from the Court.

*Lushington, and Addams, for Mr. Manly.*

*Jenner, and Haggard, for Mrs. Lakin.*

JUDGMENT.

Sir JOHN NICHOLL.

The papers propounded are, under the circumstances of the case, entitled to be considered as the will of the deceased. The deceased had formerly been a governess in the family of Mr. Gosling; and, at the time of her death, filled the same situation in Mrs. Carr's family, who resided at Dunston Hill, near Durham. She appears to have saved about 1200*l.*, which was invested in India bonds, and managed for her by Mr. William Ellis Gosling. On January 11th, 1827, being then at Dunston, she wrote to Mr. William Ellis Gosling, and, after stating that she wished to transfer her money into some other stock, and mentioning the bad state of her health, she went on—

“I will trouble you again respecting the disposal of my little property, if you will permit me, as I feel more likely to die, than to live.”

In consequence of this letter, Mr. W. E. Gosling wrote, advising her to make her will, and offered his assistance “in submitting it to a professional man, to ascertain that it was properly drawn up, and in taking care of it for her.” In reply, she caused to be written, by one of the Misses Carr, the papers propounded. Paper A, was as follows:—

“Dunston Hill, Jan. 22d.

“My Dear Mr. William,

“I am very much obliged to you for suggesting that it would be better for me to leave the formula of the will to you, as, no doubt, you will do right, and I should do wrong. I have five nephews and nieces, to whom I wish to leave a hundred pounds a-piece, if there is enough. Their names are Mary, Rosa, Frederick, Georgiana, and James; a hundred pound in money amongst my other friends, with the disposal of which I will trouble Mrs. Sandoz, and the residue to my brother. I will not trouble you with regard to my personal property, as I dare say Mrs. Sandoz, or her daughter, will have the goodness to do that for me.

“I am very thankful that you will undertake to do it for me, for I feel that I am quite unequal to do it at present.

“I am, &c.

“MARY MANLY.”

By the second (marked B), addressed to Mrs. Sandoz, after giving to the two Misses Gosling five guineas each to purchase a ring or a seal, she says,—“I will leave a memorandum for what is to be done with the residue of the 100%, and also with my goods and chattels, if either you or your daughter will have the goodness to take charge of them.”

The first she signed herself, the latter she was too exhausted to sign.

Here, then, is a full disposition of her property among her brother's children, for whom also she marks her affection in the letter to Mrs. Sandoz. The question is, whether she abandoned this disposition or adhered to it; and considered it final, and operative. Nothing further was done either by herself, or by Mr. Gosling, and; I think, the true construction of her conduct is, that she imagined nothing further necessary: she leaves the formula to him, but she had declared her wishes, and she had signed them; and, not receiving any subsequent communication from Mr. Gosling, she would conclude that she had done all that was essential, and that he had ascertained the letter would have legal effect. She, however, did intend to give some directions relative to the division of a sum of 100% among her friends; but that was to have been a separate act, the non-performance of which—whether arising from ill health—from indecision—or from change of purpose in that respect—cannot invalidate, or affect paper A; nor paper B, as far as it goes. Here is particular affection pleaded for the children of her brother James; and no intercourse with Mrs. Lakin, nor the Masons. The paper itself sufficiently shows regard, and testamentary intentions—on this point it does not require extrinsic support.

THE COURT is, then, satisfied, that she intended to make this disposition, that that intention continued till death, and that she considered these papers operative. I, therefore, admit the allegation; and, if the facts pleaded are proved, shall have no hesitation in pronouncing for the validity of these papers as her last will.

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This allegation being fully proved, the COURT, in Hilary Term, 1828, decreed administration, with the papers annexed, to James Manly, and gave the costs of all parties out of the estate.

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### MARSH v. TYRRELL and HARDING.—p. 133.

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#### *On the Admission of an Allegation.*

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Where fraud is charged, the Court allows a greater latitude of pleading than in ordinary cases; but, even then, remote facts must not be as minutely stated as those which bear directly on the point at issue.

THIS was a suit respecting several testamentary papers of a married woman, executed under certain powers reserved to her by deeds entered into before her marriage. The deceased, Sophia Harding, died, at the age of sixty-one years, on the 8th of May, 1827. A will, dated March 9th, 1827, and a codicil, April 21st of the same year, were propounded by Edward Tyrrell, one of the executors; and a previous will and codicil, both dated February 28, 1818, were propounded by Arthur Cuthbert Marsh, one of the executors thereof. John Harding, the husband,

who was appointed an executor under the will and codicil of 1827, appeared by a separate proctor, and prayed the Court to pronounce for an intestacy.

An allegation had been given in, on behalf of Tyrrell, reciting extracts of an indenture bearing date March 8, 1816, between Sophia Harding—then Smyth, the deceased, of the first part, William Marsh, Arthur Cuthbert Marsh, and Richard Creed of the second part, by which it was provided that certain monies and stocks should be invested in the names of the three latter persons, and should so stand, upon trust, to pay over the interest to the use of Sophia Harding, then Smyth, independent of any future husband, with a power of disposal by will, attested by two witnesses; and—as to one sum of 10,000*l.*—by a deed of gift also.

The plea then exhibited a copy of the power, and alleged—that, in pursuance of this power, she gave instructions for, and afterwards executed, by mark, the will of March, 1827; and also the codicil of April 1827; and her capacity at both times.

The question now arose on the admissibility of an allegation, brought in on the part of Arthur Cuthbert Marsh.

*Addams*, in support of the allegation.

*Lushington*, and *Nicholl*, *contra*—were of counsel for Mr. Tyrrell.

*Phillimore*, for Mr. Harding.

JUDGMENT.

SIR JOHN NICHOLL.

This allegation is, certainly, of very great length, consisting of thirty-five articles, and occupying above seventy pages; there are, in addition, twenty-eight exhibits, and reference is made to other instruments. It is a consideration not to be overlooked, that, if an allegation of this extent be essential in reply to a *condidit*; answers of an equal length, and entering into much explanation, will be requisite—and from two parties appearing by separate proctors.—and the quantity of the depositions will, necessarily, be almost incalculable. Thus great expense will be incurred; but the mischief will not rest there; for, as fraud is charged, it may be expected that every passage, capable of proof, will be contradicted, and that, even where no direct contradiction is offered, the effect of the charges will be attempted to be taken off, by giving a different colouring to the circumstances. This may run to a still greater bulk, and lead to further responsive pleading, and to exceptive allegations. Yet, if justice, the primary object, requires this detail for the purpose of detecting and obviating fraud, it must be gone into; but the extreme length of a cause may, of itself, tend to defeat justice, since the enormous expense may prevent its arrival at a due and proper conclusion. My duty, therefore, is not to allow a minute examination of distinct and remote facts, which only bear, by inference, on the point at issue; while, in respect to those which bear directly on, and are more nearly connected with, it, greater latitude must be permitted.

What, then, is the substantial issue? The suit arises upon the will of a married woman, and it is agreed, on both sides, that she had the power to make a will, under the deeds of settlement in 1816 and 1817; for, though the husband may not admit them to be valid, he cannot call them into question in this Court. The will of 1827 is attested, as required by the power, and is, therefore, to be considered just as if she were sole. The executor sets up this instrument, and, if its *factum* be proved—if it be the will of a capable and free testatrix, there is an end of the case.

The *factum* of that will is, then, the true issue: except legacies to three servants, it gives to the husband every thing over which she had a power of disposal. There is also a short codicil, merely leaving rings to three friends. Both instruments are attested by three witnesses, and were propounded in a mere *condidit*, pleading the deed of settlement, execution, and capacity. The present allegation is for the purpose of impeaching that will and codicil, and of showing fraud, circumvention, importunity, and conspiracy. The history and circumstances, as laid, are certainly strong; and hold out a suspicious appearance against the husband. To establish such a case, and to detect, and defeat, the fraud, may require considerable detail; for to obtain a will of this nature would, probably, be a clandestine transaction, to which a few persons, joined in the conspiracy, would alone be privy, and which could only be unravelled by entering into a detail of circumstances, showing the improbability, inconsistency, and, ultimately, the falsehood of the adverse case.

The party opposing the will is the executor of a will made nine years previously. The several deeds of settlement were entered into in 1816 and 1817: the marriage took place in June, 1817: the will, in favour of Marsh, was executed in 1818; and its *factum* is not impeached. There is no trace of any intermediate testamentary act, which, operating as a revocation, would disprove uniform adherence to that will. It may be, therefore, very important to ascertain the reasons of that will, as they may show the improbability of such a sweeping benefit to the husband.

After these preliminary remarks, I shall proceed to examine, summarily, the present allegation.

The first article enters into a detail of her property—the advantage of which I cannot see, as the instruments show its amount and nature.

The second article, certainly, carries back the history very far; but, as the case considerably depends on adherence to the disposition of 1818, it may be necessary to trace back her life in order to discover, why she should have selected this particular branch of the Marsh family for the objects of her testamentary bounty; more particularly as, after Marsh had undergone misfortunes, she persisted in her previous intentions: it may be, indeed, that his difficulties were an additional reason for the continuance of the disposition.

The third, and fourth, articles contain very long recitals—they are useless, and should be omitted, as the deeds themselves are before the Court.

The succeeding articles, to the tenth inclusive, are not objected to as inadmissible, but as only requiring to be reformed and compressed.

The eleventh and twelfth articles are material and admissible, for it is a fact in this case that, by the will of 1818, a legacy of 500*l.* was left to each of three servants; which legacies are reduced, by the will of 1827, to 300*l.* each: it is, therefore, important to show a continuance of her confidence in, and affection for, these servants.

The thirteenth pleads general treatment, and is admissible.

The latter part of the fourteenth article, and the exhibits in the fifteenth, have been objected to; and I agree in the objections taken against them. The letters cannot be read as proofs of importunity and ill treatment, on the part of the husband, for it is quite clear that the deceased was not privy to the parts containing complaints against him; but had those complaints been written from her dictation, they would have been evidence on the same grounds that her declarations would be received.

The letters may, perhaps, on revision, be found admissible as proofs of other circumstances, for if written, even in part only, by her direction, they show confidence in this servant, who is a legatee of a larger amount in the former, than in the latter will.

I shall not advert to the remainder of this allegation more particularly than to remark, that it is asserted, the deceased was reduced to a most unresisting state; that, in that state, this will, exclusively in favour of the husband, was obtained from her; and that other conduct, of a very suspicious nature, was resorted to by him, and by some of the persons connected with this will.

The thirty-fourth article, when considered with reference to these circumstances, may be important. I shall not specify any other article, but recommend to the counsel a general and careful revision of the whole.

Allegation reformed.

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In the Goods of JOSEPH HALL.—p. 139.

(On Motion.)

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An action at common law being brought, in the Archbishop's name, by the administrator, *de bonis non*, against the executors of the original administrator for the balance of the intestate's effects, the Court will direct the bond, given by the original administrator, to be attended with, on security being given to indemnify the Archbishop against costs.

JOSEPH HALL died intestate in May, 1820, leaving one brother and sister, and a nephew and niece—the only persons entitled in distribution to his personal estate.

In the month of June, letters of administration, under seal of the Prerogative Court of Canterbury, were granted to John Hall, the brother; he died in 1824, without having made a distribution, and leaving a considerable sum of the intestate's effects in his banker's hands. By his will he appointed his widow and Joseph Hodgkinson executors: they took probate. In March 1825, the nephew and niece took administration *de bonis non* to Joseph Hall, and, as his legal representatives, made repeated applications to the executors of John Hall, for the balance of the intestate's estate, which they admitted was in their possession, but refused to pay. An action had, therefore, been brought against them, in the Court of King's Bench, by the administrators.

*Lushington*, on affidavits that his parties were legally advised they could not proceed to trial, unless the administration bond, a breach of which was assigned, was produced; and stating, that the action was brought solely against the executors of the original administrator, and not against the sureties; and that his parties were willing to give security as against costs—moved the Court to direct the administration bond to be attended with in the Court of King's Bench, and produced at the hearing of the cause described, “The Archbishop of Canterbury v. Hodgkinson and Hall.”

*Per Curiam.*

The Court granted the motion; but thought it fit that the Archbishop should be indemnified against costs, as the action was brought in his name.

Motion granted.

## CUNDY v. MEDLEY.—p. 140.

*On the Admission of an Allegation.*

Papers, on the face of them, unfinished, with no circumstances to account for such their state, are presumed to be abandoned, and, consequently, are not entitled to probate.

Two papers were propounded as, together, containing the last will of John Medley. The first began:—

“This is the last will and testament of me John Medley of London which I now make and date the twenty second day of October eighteen hundred and twenty four:”—and, after enumerating his property, giving several legacies, and bequeathing the residue, it concluded—“this is my last will and testament dated as above the twenty second day of October eighteen hundred and twenty four. I appoint my Executors.”

The second was in the following words:—

Mr

“Exors, John Cundy of the house of Capel Cuerton and Cundy Stockbrokers Royal Exchange London to whom I give and bequeath one hundred pounds”

The allegation pleaded, that John Medley died on the 12th of August, 1827, a bachelor, leaving behind him two unmarried sisters—a married sister—and several nephews and nieces who would have been entitled in distribution if he had died intestate; and that his personalty amounted to 17,000*l.*: that he was a man of retired habits, reserved about his affairs, and kept up little intercourse with any person: that he had no occupation, that he employed Capel, Cuerton, and Cundy as his stockbrokers and bankers, and reposed great trust and confidence in them: that in 1820, the house where he lodged was burnt down: that 250*l.* in bank notes, belonging to him, were destroyed: that Capel, Cuerton, and Cundy, having ascertained the numbers, and given security, obtained payment of the amount at the bank: that in October 1824, the deceased wrote No. 1, and some time afterwards, No. 2—intending them together to operate as his will; and by No. 2, appointed Mr. Cundy executor: that both papers were in the deceased’s hand-writing: that they were found in a pocket-book deposited in a trunk in his bed-room, wherein he kept other papers of moment.

This allegation was given on the part of Mr. Cundy, and opposed by two of the deceased’s sisters, Ann and Priscilla Medley, who prayed, that the Court would decree to them administration of the goods of their late brother, John Medley, as dead intestate.

*Dodson*, and *Addams*, in support of the allegation.

*Lushington* and *Nicholl*, in objection to its admission.

JUDGMENT.

Sir JOHN NICHOLL.

It would be contrary to all the principles maintained in this Court to allow the present allegation to go to proof. The paper No. 1., is, on the face of it, unfinished: it is not subscribed—it concludes, “I appoint my executors,” and there breaks off abruptly: it is written on the back of an old passport from the French minister: the deceased evidently in-

tended to do something more to it: at the utmost it is a draft for a will—and an unfinished draft, for he purposed to appoint executors.

No. 2 is a little scrap of paper, and there is nothing intrinsic, or extrinsic, to fix the date; but, whether it was written before or after No. 1, still both papers, taken together, are unfinished—they are mere memoranda preparatory to a more formal will: for, though in respect to the disposition of his property, he had made considerable progress, yet it is clear that he intended to appoint more than one executor, the word executors being in the plural both in No. 1. and No. 2. The deceased lived nearly three years after the only date, applying to either papers, that can be ascertained; there is nothing pleaded to account for their unfinished state, or to repel the legal presumption of abandonment; and I shall, therefore, reject this allegation—pronounce that the deceased is dead intestate, and decree administration to the two sisters, who have applied for it. Mr. Cundy must, however, have his expenses out of the estate, as it was proper that these papers should be brought before the Court, more especially as there were minors interested under them.

Allegation rejected.

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In the Goods of WILLIAM APPLEBEE.—p. 143.

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*On Motion.*

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An executor having, in pencil, altered a will (by the direction of the Testator who approved of it when so altered) and then cancelled it, only in order that another might be drawn up—the preparation of which will was prevented by the death of the deceased:—probate of the cancelled will (in its original state) will be granted, on a proxy of consent being given by all persons interested.

WILLIAM APPLEBEE died on the 7th of November, 1827, leaving behind him Mary Ann Arnald, widow, his natural and lawful sister, and only next of kin; and Sarah (wife of Charles Bassage), his lawful niece—the only persons entitled in distribution in case he had died intestate. The deceased duly executed his will on the 14th of April, 1823. In 1825, he delivered this will (the exhibit A) to Mr. Jackson, the sole executor, and requested him to make certain alterations in it. Mr. Jackson drew his pencil through the signature at the bottom of the will, and made some alterations with the same material: the deceased expressed his approbation of them, and said, that he would make a copy, and execute the same in the presence of witnesses.

On the 29th of September, 1827, the deceased mentioned to his solicitor, that he had made his will in his own hand-writing, and promised to show it to him; and on the first of November, he told an intimate friend—whose opinion he had asked respecting the papers marked B—that he would write his will again; and, on the evening of the same day, the deceased mentioned to his sister that he proposed to re-copy his will. On the 6th, the deceased brought the papers (B) from his bed-room into the parlour, and said to his sister, “That he had intended to reduce them to a smaller compass, but found himself too weak to do so; and added, that if he did not get better, he would have his will written for him on the morrow.” On the following day, the deceased died: “B” was found in a closet of his bed-room; and “A” was found (with the sig-

nature of the deceased, and the names of the witnesses struck through) in a box with leases, and documents of importance.

These circumstances were fully substantiated by affidavit, and Mrs. Arnald, and Mrs. Bassage and her husband, had executed a proxy, consenting "to probate of the said will of the deceased, bearing date the 14th of April, 1823, or letters of administration with the said will, or the said testamentary memoranda annexed; of all and singular the goods, chattels, and credits of the deceased, being granted in such manner and form, and to such person, as the Court may direct."

*Lushington* moved for a decree.

*Per Curiam.*

The paper B is, in substance, the same as the will of 1823, marked with the letter A; but it also contains a great deal of matter extraneous, and not of testamentary import. There can be no advantage in annexing it to the will. The signature of "A" being struck through, is to be regarded as preparatory to the deceased making a new will—which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation<sup>(a)</sup>. The Court, therefore, as the consent of all parties interested has been given, thinks it would best consult the intentions of the deceased, by decreeing probate of "A" singly, as it originally stood before the signature was touched.

Motion granted.

(a) Vide *Onions v. Tyrer*, 1 P. Wms. 343; *Burtenshaw v. Gilbert*, 1 Cowp. 52; *Ex parte Ilchester*, 7 Ves. 372, 379; *Winsor v. Pratt*, 2 B. & B. 650.

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In the Goods of ANNA MARIA ORMOND.—p. 145.

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(*On Motion.*)

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The Court will grant administration, with papers annexed, to a person, as attorney of an executor according to the tenor, without requiring a regular power of attorney; such person being clearly authorized to act, by letter, from that executor—the executor of the residuary legatee (who was also executor, but did not take probate) having consented.

ANNA MARIA ORMOND died at Surat, in the East Indies, on 11th May, 1826—a widow. By her will, duly executed, she appointed her mother, Mrs. Bloxam, sole executrix, and residuary legatee. This will was left in England. The deceased subsequently wrote, in India, three papers of a testamentary import; and probate of these was granted at Bombay to Richard Moore, as executor according to the tenor. He collected the property in India, and transmitted it to England to Mr. Bloxam, the deceased's brother, with a letter (dated Surat, May 4, 1827,) containing this passage—"I felt gratified on hearing from you, as it enables me to entreat your good offices to act in the will of your lamented sister, and to conclude my executorship."

*Lushington*—on these circumstances, and after stating, that Mrs. Bloxam, the mother of the deceased, survived her daughter, but died without taking probate; and that Mr. Isherwood, the executor named in the will of Mrs. Bloxam, consented to the present application—moved, that letters of administration (with the will as contained in four paper writings annexed) of the goods of Mrs. Ormond be granted to Charles

John Bloxam, as the lawful attorney, and for the use and benefit of Captain Moore.

*Per Curiam.*

There is no occasion, in the present instance, for the Court to require a regular power of attorney: (a) the letter to Mr. Bloxam so manifestly authorizes him to act in the arrangement of the deceased's property, that its hand-writing being proved, and the consent of Mrs. Bloxam's executor being regularly given, the administration may pass. But the securities must justify.

Motion granted.

(a) Peter Bramhall Eaton, and Martha Eaton—his wife, having been drowned together in the Bristol river, leaving a daughter—their only child—aged six years,—administration of the effects of Peter Bramhall Eaton was granted to one of two appointees of the next of kin, then resident in the West Indies,—on the production of a letter from him, in which he expressed a wish “that they will act for him in every point both for his little niece, and himself;” and on the consent of the infant's relations in this country.—*Hilary Term, 1828.*

### HOBY v. HOBY and HOBY.—p. 146.

Supervening insanity is sufficient to account for the non-execution of a paper, written shortly before, and consistent with the intentions, and affections, of the deceased; nor will it so reflect back on previous eccentricity as to invalidate such a paper.

#### JUDGMENT.

SIR JOHN NICHOLL.

The deceased, James Hoby, died at Walham Green, Chelsea, on the 14th of March, 1826, a bachelor, leaving two brothers—the only persons entitled in distribution to his property, which amounted, in value, to 4,000*l.* He had, formerly, kept the Fountain Tavern, in Catherine Street, Strand—and a paper—all in his own hand-writing, not signed, nor attested—is propounded, as his will, by his cousin James Hoby, the executor named therein; and it is opposed by the deceased's brother Thomas Hoby. The grounds of opposition being not merely that the paper is unexecuted, but also, that the deceased was not of sound mind; it is necessary for the Court to consider both these points.

The contents and form of the instrument may bear upon each of them. It is in these words:—

“Walham Green, 17th of Aug. 1825.

“I James Hoby of Walham Green Middlesex being of sound mind and body and fully revokeing all former wills heretofore made do declare this my last will and testament when it pleases God to call me I wish to be buried in a plain and decent way at East Barnet near my Da Parents and I nominate and appoint my Da Cousin in Skinner St Fringe Manufacturer my executor (Mr. James Hoby) to have possession of all my effects and property and to pay and dispose of what is given as legacies and bequests to those hereinafter named to his sister Mrs Wright of Hereford (my) cousin I bequeath one hundred pounds and the print of our Saviour on the Cross now in the dining room To Mr. James Cranston Junr of the King's Acre Hereford all my books to Mrs Ed-

wards my cousin of Bunshill I give and bequeath one hundred pounds—to my unfortunate brother Tom I give one hundred pounds—to my poor Cousin Sarah Clarkson 20ℓ—to the old Friend Mr Salkeld 20ℓ.—to Mr Warren resident here for his kindness and attention one hundred pounds—and after the payment of these legacies I give and bequeath all the remainder of my property to my Dr Cousin and Executor to have and hold the same for himself and family hoping he will take care to pay these legacies and bequests—not being at this time involved in any debts I leave my cousin and executor Mr James Hoby to sell or dispose of such part of the property as he chuses or retain it excepting the bequests made in the will—Also the Lease at Walham Green I hope it is clearly understood that the linen wine household and every other articles on the Excepting has been bequeathed is to become my Cousin Mr James Hoby's together with money at my Bankers—

“I have here unto set my hand  
and signature

n

These are the very words of the will. There is the commencement of a letter, but there is no subscription. The date, and also the few last lines, are in darker ink than the body of the will, and were written apparently, at a different time from the remainder—except, perhaps, some corrections which are in the darker coloured ink, and some letters which seem as if they had been amended or retouched. This instrument, then, is a complete disposition: it leaves some legacies—it appoints an executor—and bequeaths the residue: it is rationally expressed, and, though it passes over the deceased's brothers, it disposes of the property among his family, giving, however, the bulk of it, to his cousin James Hoby.

The evidence applying to the deceased's affections proves too clearly, even to require citing, that he was wholly estranged from his brothers, and greatly attached to this cousin—and that these feelings were not the offspring of any sudden and recent impression, but may be traced back as far as the account of his life extends. The Worralls speak to declarations of this import, while he lived at Ealing in 1815: nay, Brundrett says, that, at the time of his first employment, as the deceased's confidential solicitor—viz. fifteen, or sixteen years before his death—“he was in the habit of speaking of his brothers in the strongest terms, as disapproving their characters, and conduct.”

There is clear proof, then, that he felt hostility towards his brothers; that he entertained a most unfavourable opinion of them, and declared they should never have any of his property: while, on the other hand, the whole *res gesta* shows his entire confidence in his cousin James—with him he lived on terms of the most friendly intercourse—to him he resorted for advice, or assistance, in any difficulty, and he alone, during the long illness subsequent to the will, had the care and custody of the deceased.

That his affections, long settled and fixed, were entirely in concurrence with the disposition of his property under this will, is a material fact, as showing:—first, that it was not an hasty and transient purpose, which he was likely to abandon, and to which it was not probable he would adhere; secondly, that it was not an intention arising out of any delusion of mind, and insane dislike, against his brothers: but, thirdly, that, on the contrary, the act itself was quite in unison with the sound

mind of the deceased, and bears no marks of any perversion of understanding; nor is any change of former intentions. It does not grow out of, nor, in any manner, vibrate in concert with, the subject on which, more particularly, the insanity showed itself when that calamity did actually visit him. These considerations go strongly to sustain the whole case in both its branches.

The deceased was a person of great singularity of character; he was odd and eccentric—vain and boastful; had collected china and books, prints and plate in his house, which he was proud of displaying: he was not weary of telling their history again and again—*decies repetita placebit*. He was fond of his garden, his flowers, and his green-house plants; he liked to exhibit them, and to boast of their great value, and, as amateurs frequently are, he was a little suspicious that they were stolen by his job-gardener. He was also irritable, and liable to excitement—passionate and violent. It is not, then, extraordinary, that a person of this temperament should finally become actually insane; and it has been justly argued that this subsequent insanity reflects back on these eccentricities a semblance of an insane tendency and character, but it will not convert them into proofs of actual insanity already existing; they may be either symptoms of ultimate derangement, or collateral accompaniments of existing disease, if other acts, decidedly insane, could be shown—but not insanity *per se*.

In such an individual, it is not quarrelling with the coachman for stopping too long at an inn; nor dabbling the mess of fish in his face for neglecting to take care of it; nor violently kicking his dog, nor boasting that half Fulham belonged to him, that can prove actual insanity,—they are oddities—they are eccentricities—they are even symptoms of approaching derangement—but they do not establish derangement itself. And it is to be observed that most of these acts are imputed to him at a time when the principal of the brother's own witnesses—the Kings—admit that his mind was sound. King first attributes insanity to him on Sunday, the 14th of August; for he says—that the deceased was odd, but he never considered him decidedly insane till the 14th of August.

Now King was intimately acquainted with him—for six or seven years lived near him—had borrowed 300*l.* of him, on bond, in June or July; yet various of the acts, from which it is attempted to describe him as insane, happened long before that period. On the other hand a dozen witnesses, long acquainted with him, and of different descriptions—his medical attendant, his confidential solicitor, his neighbours, his inmates, and his servants—all swear they never considered him of unsound mind till the 21st of August, four days after the date of the will.

It thus becomes important to inquire into the state of the deceased on the 14th of August, and during the intermediate period, till the 21st. On the evening of Sunday, the 14th of August, he fancied he had been robbed of his plate by Warren. This Warren was a sort of protégé of the deceased; he had been brought up as a cabinet-maker, which was his father's trade. The deceased had lent him money to go into business at Bath; he there failed. He afterwards, in London, with the assistance of the deceased, set up in business again; and having been there equally unsuccessful, he had, for some time, resided with the deceased as a companion. He is a legatee of 100*l.* in the will, and the deceased, as he states, also gave him, on the 17th of August, a draft for 100*l.* and a bond from King for 300*l.* Warren's explanation of the transaction of Sunday,

the 14th of August, is that the plate was usually kept in a chest within a cupboard in his bed-room; that he had, that morning, taken it out to clean; that he and the deceased had some angry words; that he put the plate away, and went to town, saying he did not know whether he should return. During Warren's absence, it appears from the brother's witness, Nutt (the details of whose evidence are far too loose to be relied on,) that the deceased, who had been examining his treasures of different kinds, became very enraged, thinking, and having worked himself up into the belief, that he had been robbed of part of his plate, went to his neighbour, King, in great agitation, and told him—that Warren had robbed him; that he would go to town to his cousin, James Hoby, immediately, and obtain a warrant, to arrest Warren, who had said “that he did not know whether he should return;” and he thought, perhaps, he might go off with his property. He also made the same complaint, and charges, to others of his neighbours, and certainly was exceedingly agitated. It was, at this time, between eight and nine o'clock in the evening: King very kindly undertook to go, and went for him to James Hoby. However, before King came back Warren had returned, showed the deceased where the plate was, explained his error, and the deceased was quite satisfied; and upon King's reaching the house, he finds them together in a friendly manner; the matter being perfectly cleared up.

Now, that a person of this frame of mind, supposing himself to have been robbed by an almost adopted son, should be agitated, and should be nearly, if not quite, worked up into madness, is not extraordinary. That, after he became decidedly insane, this notion, so vividly imprinted on his imagination, should return, is also not extraordinary; but I am by no means satisfied, that the character of actual insanity, or that any thing beyond high excitement and irritation, manifested itself, even on this Sunday, the 14th of August. The excitement, undoubtedly, was extreme—it might amount to actual delirium—*Ira furor brevis est*—as long as it lasted the mind might be unsound, but when the mistake was discovered, the mind was restored, and reason resumed its place.

King deposes, that the deceased both then, and the next day, said, “his head had been so bad, he really did not know what he was doing when he came to him.” And this declaration has been relied on as proving derangement—derangement by the deceased's own admission. If so, it also proves recovery—the removal of delirium; for one of the strongest proofs of re-established faculties, is the consciousness and admission of the party himself, that he had been disordered. The return and continuance of this derangement during the ensuing week has been deposed to, and much dependence is placed on it. To Nutt, as I have before said, I cannot trust; nor to the Kings' accuracy, in respect to *time*; but their veracity I have no reason to doubt. They mention no circumstance enabling them to fix the events, as occurring, rather between the 14th and 21st, than after the 21st; they frequently saw the deceased subsequent to the 21st; they might easily confound what passed on the later occasions, with what they suppose to have happened at a previous period. King swears that a letter, from the deceased, was brought to him early on Monday morning, by Warren—he repeats it positively; yet, when the letter is shown him, he admits “that it must have been brought to his house by some other person after Warren had left him.” I believe it to have been an honest mistake; but if he could

fall into such a mistake, both as to the person and as to the time of day, how much more easy was it for him to have been in error, as to whether these circumstances happened in the week before the 21st, or in the week after! I am the more disposed to think that they must have happened at the latter time; because the facts correspond with what then took place, but not with what is established—by unsuspicious proofs—to have been the condition of the deceased during the foregoing week. On this part of the case, it is not, I think, shown, that decided insanity existed between the 14th and the 21st—at the utmost, reason, was fluctuating; and it appears doubtful, whether—on Sunday, the 14th, while the impression that he had been robbed, remained upon his mind—whether, even then, he was worked up to a state of delirium.

I proceed, then, to the evidence immediately referring to other acts in that week; and, more especially, to the instrument propounded. This, as I have said, was manifestly written at two different times. The bulk and body of the will, comprising the complete disposition of his property, was first written in paler ink—the date, August 17th, 1825, and a small addition at the end, in a darker ink, and one or two slight corrections were made, and a few of the letters retouched, with that darker ink: so that the body—that is the important part, may have been written long before the 17th of August. On that day, the uncle of the deceased (the father of the executor) visited the deceased, and found him in his bedroom, sitting at a writing table with his papers about him. The deceased said “he had been busy making his will,” and asked him to go down and order luncheon, and he would come down to him presently. The uncle staid to dinner. After dinner, he says:—

“He and the deceased being alone together, the deceased, pointing to a picture which was then hanging up in the room, observed that he had left the picture, and also 100*l.* to Elizabeth, meaning Elizabeth Wright, deponent’s eldest daughter; that he had also left a legacy of 20*l.* to his friend Salkeld, and 20*l.* or 10*l.* to Mrs. Clarkson, a cousin of the deceased; that he had left his books to Mr. Cranstoun. He then said that he would not tell deponent more of his will; who, in a joking way, said, that he did not wish to know, as he had no occasion for any thing from him. The deceased then added, that he had left the greatest part of his property to those he liked best; and he recollects him to have said, that he had left a young man, of the name of Warren, 100*l.*”

Here is a direct reference to, and recognition of, this will; for he declares that he had left the greatest part of his property to those he liked best, and the whole history demonstrates, that his cousin had long been the person he liked best. Nutt thinks, but is not positive, that this happened on the 16th: it is not very material, whether it happened the day before, or the afternoon of the day, on the morning of which he wrote his will: if on the 16th, then it was preparatory to the act of the following day—if on the 17th, at dinner time, then it was after the transaction with Caird and Rouse, who were there between eleven and twelve o’clock. At all events, this conversation furnishes strong evidence in support of the act, as showing decided intention, and perfect capacity.

It is fully proved, that his opposite neighbour Caird, a baker, was requested to come in order to attest his will, and that Mr. Rouse, the deceased’s apothecary, happening to be at Caird’s house at the time, upon Nutt, the messenger, telling the deceased, he sent a second time begging

Mr. Rouse to accompany Caird. They both went over, and found the deceased in his dining-room, at a writing-table, with papers before him: he said "he was very ill, and had been making his will, being assured that he could not live long." He read the will to them, and tendered a pen to Rouse that he might witness it; and, undoubtedly, it is no proof of derangement of mind, in such a person, that he was not aware of the regular form of executing a will. Mr. Rouse (thinking the deceased bilious, and out of spirits,) feeling his pulse, said he was in no danger, rallied him, and told him, he was no worse than he had been before, and, in order to avoid depressing his spirits, prevailed upon him to postpone the formal execution.

On the ninth interrogatory he says:—

"He advised the deceased to postpone the execution of his will, because he considered that his mind wanted rousing; that he was already too much depressed and out of spirits, and the execution of so solemn an instrument was likely to make him worse; respondent did not perceive that the deceased's mind was in a confused state, or that he was unfit to make a will; his memory was perfect, and his understanding correct."

Caird fully confirms Rouse's opinion, so that this alone prevented the execution,—there was not any hesitation on the part of the deceased: it was not deferred from his doubting or deliberating, but because his medical attendant dissuaded and diverted him from it.

Both these witnesses were well acquainted with the deceased; Caird had been his opposite neighbour for five years, with whom he used often to gossip, as he expresses it; Rouse, his apothecary, for some length of time. They knew his general mind, and habits, and deportment: if he had been, at this time, in a state of insanity and derangement, they must have discovered it. This evidence, then, bears strongly on both points—fixed intention, and soundness of mind. I might, perhaps, rest the case here; but where there is any suggestion of insanity, it is proper to look at all confirmatory circumstances.

On the following day, the 18th of August, the deceased was worse, and Dr. Latham was called in. His disorder was not one of the head—not paralysis or apoplexy—not brain fever—it was diarrhea. Dr. Latham, it appears, was not then consulted for the first time—he had often attended him before. He says:—

"On the 18th of August, 1825, he visited the deceased, who thought himself dying; that deponent laughed at him, knowing the deceased was not in danger; that on the 19th or 20th, when he again saw him, he was much better; that on the 21st, he found him in a state of great nervous irritation and excitement, which were partly allayed; but, on the 1st of September, he considered that the case should be treated as one which might end in confirmed insanity." He further says, "that on the 18th, and on the intermediate days between that and the 21st, he is quite certain that nothing occurred, in the manner and conversation of the deceased, which gave him any reason to believe that the deceased was not of perfect capacity; he conducted himself and conversed as a person of sound mind; and at no time previous to the 21st had he any cause for believing that the deceased was not of sound mind, memory, and understanding." And to the thirty-eighth interrogatory the same witness answers, "that on the days previous to the 21st of August, the deceased was, as respondent verily believes, and of his belief he swears positively,

of sound and perfect mind, and was capable, as he believes, of any act requiring calm and cool consideration."

It may not be unfit to remark that the character of the deceased's derangement, when it does actually take place, is rather delirium than delusion—rather high excitement than false impression. In delirium, intervals of coolness, and actual lucidity, are much more common than when a permanent delusion has seized the mind; though, when excitement returns, some circumstance, that had before made a strong impression, may, not improbably, revert, and attend the delirium: such appeared to have been the case with respect to the deceased's notion that he had been robbed, and by Warren; but that is not an impression, in any degree, connected with the disposition contained in this instrument, nor showing itself in these testamentary transactions.

It was observed that there was an inconsistency in the legacy to Warren "for his kindness and attention," and these repeated charges of robbery. In the first place, this argument assumes that the Kings are correct in fixing the date of those declarations between the 14th and 21st of August: in the next place, it assumes that the body of the will was written on the 17th, which might have been written long before the 14th; but, in the last place, what sort of inconsistency does it show? Inconsistency with the existence of insanity!—it shows, that when he wrote this will, he had not on his mind the false idea that Warren had robbed him; it, therefore, proves rather the absence than the presence of disorder. His whole conduct to Warren is natural enough, supposing him sane—he had, through error, and under excitement, made false charges against him on the 14th—he was convinced they were unfounded—Warren was hurt, and felt injured by them—on the next morning, the 15th, the deceased made him a present of a diamond ring—a sense of his injustice rendered that act not unnatural—on the 17th, being about to execute this will, by which he had bequeathed him 100*l.* only, he gave him a draft for another 100*l.* and King's bond for 300*l.* borrowed in the previous June or July. Whether the will was written before, and he made these gifts, not choosing to alter the will, or whether he preferred that they should not appear in his will—even if written on that day—yet they do not bear the character of an insane act, much less of still thinking that Warren had robbed him. His property was worth about 4000*l.*: the amount of these presents, particularly after their long connexion, and these unfounded charges, might not be irrational nor extravagant; nor does he irrationally give him either articles bequeathed specifically by will, nor even all his property *ejusdem generis*; for there are other bonds actually left sealed up, and the envelope thus indorsed, "To be opened by my dear cousin and executor Mr. James Hoby." This is not an unimportant act—it is an act of sanity, and not only so, but is strong to prove adherence. Whether written before the 17th, on the 17th, or after the 17th, it still has effect—if before, it shows that the will was written before, and evidences a long and deliberate intention while sane; if on the 17th, it confirms the sanity on that day—if after, it proves adherence to this will—in either case it tends to support the will. Adherence, however, is very sufficiently established, and abandonment of, and departure from, intention, are in the last degree improbable.

On the 18th, the deceased wrote to his cousin, requesting he would bring down Brundrett, as he was extremely ill—"in a dangerous way."

Warren, who carried the letter, told the cousin that the deceased had alarmed himself; that the medical gentlemen thought that there was no danger, and that, in a day or two, he would be able to go to Brundrett (that no danger was apprehended is confirmed by the testimony of Latham and Rouse): Brundrett, the solicitor, was, therefore, not brought down; but on that, or the following day, his cousin went to see the deceased, and dined with him; the will was produced; this cousin urged him to alter it in favour of his brothers—the deceased refused, and said, “he would go to Brundrett the next day and have his will made out as it was; after the behaviour of his brothers to him, he would do no more than he had done.”

Here, again, is firm adherence to the will, and sound mind.

The next day the deceased was no better; the diarrhea continued; and on the 21st he became delirious and insane, and so he remained till his death, though with intervals of calmness. The completion of the act was thus prevented, but the testamentary intention existed as long as capacity existed.

It has been asked—why was not the will executed in the intervals of the disorder?

In the first place, the intervals were hardly of that duration that it was proper, or likely, that such an act should be proposed. In the next place, the deceased was not in possession of the will; for when actual derangement seized him, all his papers were sealed up, and sent to Mr. Brundrett, his confidential solicitor, under the authority of James Hoby, who, by the instrument itself, as well as by the sealed envelope, was declared his executor.

Upon the whole, I am of opinion, that this instrument contains the same testamentary intentions of the deceased, and for these reasons:—

First, That it is founded upon the conduct and declarations of the deceased for years before his death; and this constitutes an important foundation of the act:

Secondly, That the deceased was of sound mind when he wrote, and, on the 17th, when he would have executed this paper; for no part of the contents connect themselves with the particular subject of the deceased's insanity—*viz.*, his being robbed:

And, lastly, That the unfinished state of the instrument is sufficiently accounted for, and the adherence to it sufficiently proved.

I, therefore, pronounce for the paper. As to costs: Thomas Hoby, as one of the next of kin, was justified, from the unfinished state of the paper, in putting the executor on proof of it: I shall then give no costs against him; nor shall I allow his costs out of the estate—because he has set up insanity, and abandonment, and has failed to prove them—besides he has a legacy of 100*l.* under this instrument: nor shall I give them to the other brother who has intervened, as the appearance of two parties in the same interest, by different proctors, is not to be encouraged. I shall leave them to the liberality of the executor.

Probate decreed.

## HILARY TERM.

### ARCHES COURT OF CANTERBURY.

BRAY v. BRAY.—p. 163.

#### *On the Admission of Additional Articles.*

In a suit for separation by reason of cruelty brought by the wife, an acquittal of her witnesses (for a conspiracy in counselling her to institute this suit) upon an indictment—laid by the husband—and his evidence thereon—in which he admitted, and repeated, certain accusations originally alleged in the libel as acts of cruelty—may be pleaded as a continuation, and admission, on oath, of that cruelty.

THIS was a cause of divorce, by reason of cruelty, originally promoted in the Consistory Court of London by Saba Eliza Bray against the Reverend Bidlake Bray; and came up to this Court by appeal from the admission of the libel. On the by-day of Michaelmas Term, 1827, the decree was affirmed, and the cause retained.

The present question was the admissibility of certain additional articles—pleading, first, that in February, 1827, an indictment was preferred, on the prosecution of Mr. Bray, against Elizabeth Malkin, the mother of Mrs. Bray; William Hammersley, her uncle (indicted by the name of William Spode); George Vance, her medical attendant; and Robert Shank Atcheson, her solicitor, for conspiring to separate Mr. and Mrs. Bray; and “for counselling Saba Eliza Bray to promote against the said Bidlake Bray a certain cause of divorce, or separation, by reason of cruelty;” that the Grand Jury, on the evidence of Mr. Bray, and of another witness, returned a true bill; that the indictment was heard before Lord Tenterden, and a Special Jury, on the 2d of November last, when Mr. Bray and many others were examined for the prosecution; that no witnesses were examined for the defence, but the evidence of Mrs. Bray, whose examination, taken in private, lasted four hours, was read; and the Lord Chief Justice then declining to receive any further evidence, the Jury thereupon acquitted the defendants.

The second article exhibited, in supply of proof, a copy of the bill of indictment.

The third, in substance, pleaded:—“That, in the examination of Bidlake Bray on the trial of the said indictment, he did admit and confess, that he had declared both before and after the birth of the child, of which his said wife, Saba Eliza Bray, was delivered, that he believed it to be the child of her uncle; that he had also asked the said Saba Eliza Bray, his wife, if she knew the meaning of incest, and that he had intended to convey to his said wife a reproach of incest with her uncle, William Hammersley, by his manner and insinuations; and the said Bidlake Bray did, in like manner, on the said occasion, admit that he

had, both before and after the birth of the said child, declared that he thought she, the said Saba Eliza Bray, did not come a virgin to his bed."

*Phillimore and Addams*, in objection.

These articles are inadmissible; they can furnish no useful information: the libel consists of no fewer than 37 articles; they embrace a long period of time, and are very detailed as to acts of cruelty; and two and twenty witnesses have been examined upon them. The Court has never gone so far in admitting evidence of "*res inter alios acta*;" the verdict at common law against a paramour is allowed to be pleaded, in divorce causes, to show there is no collusion; but even *that*, till latterly, was not admitted without much opposition(*a*). Another objection is, that we shall be compelled to plead the grounds of the verdict, and go into a voluminous statement of Mrs. Bray's evidence. In *Brisco v. Brisco*, the wife was charged with adultery; and the Court of Delegates(*b*) would not allow the proceedings in *Winnington v. Winnington*(*c*) to be invoked, in which Winnington was proved guilty of adultery with Lady Brisco.

*Dr. Jenner*.—No. Winnington was proved guilty of adultery with a person *supposed* to be Lady Brisco.

*Per Curiam*.

The reason is clear, that was another cause to which neither husband nor wife was party.

*Argument resumed*.

We remember no instance of the introduction of the proceedings in detail, as well as of the verdict. Besides, how is this indictment cruelty? it is a proof, as far as it goes, of his attachment to his wife. Again, as to the declarations, it is not pleaded that they were made to Mrs. Bray in person; but further—these very declarations have already been pleaded in the libel.

*Jenner and Lushington, contra*.

There is a great deal in this case not easy to prove, except from the declarations of the husband made at the time, or immediately subsequent; therefore the Court will not easily be induced to reject clear evidence of such declarations. As to the objection "*res inter alios acta*," in *Verelst v. Verelst*, 1 Phil. 145, the cross-examination at Common Law was invoked to discredit a witness; here, too, Bray was the party prosecuting, and was examined as a witness. Are not the repetitions of the accusations evidence of cruelty; and can the Court, on account of the length of the plea, exclude the admissions on oath of the husband that he has made such accusations? It is established that the indictment was unfounded, and only brought to put an end to this suit: this is material for the Court to know.

Both on principle, and precedent, these articles are admissible, especially when the original declarations were made in the absence of witnesses, and the whole passed merely between husband and wife.

JUDGMENT.

SIR JOHN NICHOLL.

THE Court would be very unwilling to load, unnecessarily, the cause

(*a*) Vide *Elwes v. Elwes*, 1 Consistory Reports, 289, *note*; and *Loveden v. Loveden*, 2 ib. 51.

(*b*) *Brisco v. Brisco*. Delegates. 24th of July, 1826.

(*c*) The case of *Winnington v. Winnington* was decided in the Consistory Court of London on the 23d of June, 1826.

with additional matter; but it cannot take upon itself to reject that which bears directly upon the point at issue. Looking, then, at the history contained in the original libel, it is impossible to say that the articles, now offered to the Court, do not connect themselves with the principal case. The husband accused his wife of the most abominable intercourse that can possibly be conceived—no less than incest with one of her nearest connections: and the indicting her material witnesses for a conspiracy, in order, if he could convict them, to affect their evidence in this suit, must be considered a continuance of that persecution which Mrs. Bray, if the facts stated in the libel are true, has already suffered. The acquittal, therefore, of the parties on that indictment may be important to enable the Court to arrive at a just decision of this case.

The third article is intended to establish, not merely a declaration of the husband, but a solemn admission on oath of a part of the charge brought against him, *viz.*, asserting, before and after the birth of the child, that that child was not his, but the fruit of an incestuous connection between Mrs. Bray and her uncle. Though that may be admitted in the husband's answers to the libel, the wife is not bound to depend on the chance of that admission, coupled with such explanations, and qualifications as he may choose to give. It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife.

As to its being a proceeding in another Court, and between other parties, this is, surely, the last case to which the objection of *res inter alios acta* can apply, for this is the very act of the party himself—it is his own prosecution—it is an act which he himself has done; and, therefore, he cannot say—"I was not a party to these proceedings, and, consequently, they ought not to be brought in evidence against me."

Now, in suits for divorce by reason of adultery, the action of the husband against the paramour of the wife, if brought in proof against the wife is *res inter alios acta*: for the wife is there no party to the action. The case, which has been referred to, of *Winnington against Winnington*, was still more *res inter alios acta*: for a sentence in that cause could be no evidence in *Brisco against Brisco*, for neither of the latter were parties in the former suit.

These additional articles may be very shortly proved; and, as it was undertaken that the wife's costs should not be taxed against the husband, *de die in diem*, but should be reserved to the close of the suit, no objection on that ground can now be raised. If it should turn out that the husband has been guilty of this misconduct towards his wife, he may be liable to costs as between party and party, but the claim to them, as between husband and wife, is waived for the present.

Under these circumstances I think I am bound to admit the articles, trusting that they will be proved with as little delay as possible.

Additional articles admitted.

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PRANKARD v. DEACLE.—p. 169.

Where, on the death of the Archdeacon, the proceedings in a criminal suit were moved after the execution of a proxy, but before appearance by the defendant, either personally, or by proxy, from the Archidiaconal to the Episcopal Court, and there went on to sentence, the original proctor appearing for him,

but, without a new proxy: on appeal—the appellant having been cognizant, *de facto*, of the progress of the suit; and, through his Proctor in the Court of Appeal, having recognized (by some of the formal documents in the cause) that the Proctor in the court below was his lawful Proctor,—the proceedings are valid; nor is it a fatal objection, that the articles were exhibited in the name of the *surrogate*, and not of the *Judge*.

Appearance waives any objection so far as respects the formality of the proceeding.

*Semble*, that if no proxy at all were given, the proceedings would not be null, unless it were proved that no authority was given, *de facto*, to the Proctor; and that the Principal was ignorant of them. The proxy is only essential to secure the adverse party, and to protect the Proctor.

*Quere*—whether, the Archidiaconal and Episcopal Courts being concurrent, it is any irregularity, even in form, on the death of the Archdeacon, to invoke the causes in his Court into the Episcopal Court.

Usages of different dioceses, in respect to the exercise of jurisdiction, if not contrary to the general policy of law, and to justice, may be said to constitute the law of the particular diocese in that respect.

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### HAWKES v. HAWKES.—p. 194.

A proxy from a husband in India to institute proceedings, in the Court of Exeter, against his wife for adultery, held—the wife having changed her residence, before the commencement of the suit, into another diocese—that the Court may proceed, under letters of request from that latter diocese, without a new proxy from the husband.

THIS was a suit of divorce, by reason of adultery, instituted by the husband against the wife, and which came, by letters of request, from the Episcopal Consistorial Court of Bath and Wells; but it appearing, that the proxy, which the husband (who was on service in India) had executed, was for the commencement of proceedings in the Consistorial Court of the Bishop of Exeter (in whose diocese Mrs. Hawkes was residing at the time instructions for the proxy were transmitted from this country); these facts were now mentioned to the Court, in order to take its opinion on the validity of the present proceedings, when it was stated, by the proctor for Major Hawkes, that, at the period of their commencement, Mrs. Hawkes was living within the jurisdiction from whence issued the letters of request.

*Per Curiam.*

Under the circumstances, and on an affidavit that the residence of the wife was changed before this suit was instituted, the Court will hold the proxy sufficient. It may, however, be advisable for the Proctor of the husband to send out to India for a fresh authority, which may arrive before I am called upon to sign the sentence; but if it should not, I shall hold that the proxy which has been exhibited, is valid.

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### The office of the Judge promoted by

### GRFFITHS v. REED and HARRY, otherwise HARRIS.—p. 195.

In a criminal suit for incest instituted under circumstances of vindictive feelings: sleeping in the same room (conduct which the parties, proceeded against, had been allowed without objection or complaint to continue for thirteen years,)

though attended by other facts inducing a strong presumption of guilt, is not sufficient proof of the offence; and the Court,—unless most stringent and conclusive evidence be produced,—will dismiss the parties; but give no costs. In a criminal suit, it is not a fatal variance that the defendant, in the citation, was designated “Harris” and, in the articles, “Harris” *alias* “Harry.”

THIS was an appeal from the Episcopal Consistorial Court of Llandaff from an order or decree made on the third day of February, 1825, by the Judge of that Court, whereby he rejected certain articles, and dismissed the defendants from all further observance of justice, in a cause or business of the office of the Judge, promoted by Evan Griffith against John Reed, of the parish of Wick, in the county of Glamorgan, Diocese of Llandaff, and Province of Canterbury, and Alice, otherwise Alse Harris, of the same place, spinster, “touching their soul’s health, and the reformation of their manners and excesses, and, more especially, for the crimes of incest, adultery, fornication, and incontinency by them committed.”

The parties charged were in the relationship of uncle and niece.

The appeal was not prosecuted till the 21st of January, 1826; and on the by-day of Trinity Term, in that year, the cause was heard upon the appeal, when, on behalf of the respondents, several objections were made:—It was contended, that the citation was decreed at the instance of the Proctor of the Court from which it issued; that the defendants were cited in one and the same instrument; and that they were articted together; that the articles themselves pleaded, among other irregularities, “notorious suspicion; common fame and report; and great scandal and offence to and among the inhabitants of different parishes [specifying ten by name] and others in the neighbourhood thereof:” and were inadmissible, both in form and substance.

The articles were directed to be reformed; and on the fourth session of Michaelmas Term, 1826, they were admitted, as reformed. The heading of the articles confined the charge to that of incest; and with a view to substantiate it, the eight first articles pleaded, with great care and minuteness, the genealogy of the defendants, supplying, in some instances, the absence of proper exhibits (owing to the register-books of baptism having been lost or mislaid,) by acknowledgments, and by general reputation, that the parties, in the pedigree, were respectively related to each other in the manner set forth.

The ninth articted and objected, “that all who commit the respective crimes of incest, adultery, fornication, and incontinency are and ought to be duly and canonically punished according to the exigency of the law.”

The tenth,—that, notwithstanding the premises pleaded and objected in the several preceding articles, “you the said John Reed, and you the said Alice, otherwise Alse Harry, otherwise Harris(a), some time in

(a) On the admission of the articles, as reformed, it was objected that the alteration in the name of the defendant, Harris (as it stood in the citation, and in the articles as originally drawn,) from “Harris,” singly, to “Harris otherwise Harry,” was important and substantial, and, in criminal pleadings, ought not to be allowed.

*Per Curiam.*

THE COURT, however, overruled the objection, and observed,—that it did not consider the variation material; that, in these Courts, those irregularities only were fatal which might lead to some substantial injustice; that this variation would be productive of no uncertainty, nor inconvenience, and the form had been adopted merely to connect the female defendant with the certificate of the entry of her father’s marriage, where it appeared that his designation was

the year 1809 began to live and cohabit together in a criminal and incestuous manner, and continued so to live and cohabit in the dwelling-house of you the said John Reed, in the said parish of Wick, and whilst Elizabeth Reed, wife of you the said John Reed, now deceased, was living and residing in the said house during great part of the said year 1809, and during the whole or greater part of two following years, to wit, &c. And we do further article, &c., that you were in the constant habit, during the said period, of sleeping at nights together and lying naked and alone in one and the same bed, and thereby committed the foul crime of incest."

The eleventh,—“that in consequence of the criminal and incestuous intercourse carried on between you, and your carnal knowledge of each other's bodies, you the said Alice, &c., became pregnant, and were, on or about the 18th day of December, 1811, delivered of a female bastard child, since deceased, at the house of you the said John Reed, situate in the parish of Wick aforesaid, and in the county of Glamorgan, which said bastard child was begotten on the body of you the said Alice, &c., by you the said John Reed. And we do further, &c., that the said female bastard child being likely to become chargeable to the said parish of Wick, application was made to you the said John Reed, as the reputed father thereof, by or on behalf of the churchwardens and overseers of the poor of the said parish, to provide for the support of the said bastard child; that in answer to or upon the occasion of the said application, you the said John Reed did admit and confess that you were the father of the said bastard child(a), and that you did as such, and in that character, on or about the 26th of December, 1811, together with Richard Bevan Reed, of the said parish, gentleman, enter into and sign and execute a certain bond to indemnify David John, George Thomas, and John Dunn, the then churchwardens and overseers of the poor of the said parish of Wick, their successors, and the other parishioners and inhabitants of the said parish, of and from all manner of costs and charges for or by reason of the birth, maintenance, and education of the said female bastard child, although at the earnest request and entreaty of you the said John Reed, the name of you the said John Reed, as the reputed father of the said bastard child, was not mentioned or specified in the said bond."

The article concluded by pleading divers admissions, both during the life of the child, and since its death, that they were respectively the father and mother of the child.

The twelfth pleaded the original bond, as an exhibit.

The thirteenth,—“that from and after the birth of the said child, and until the present time, you have continued and still do continue to live and cohabit together, in a criminal and incestuous manner, in the said

“Harry;” that, in that county, “Harry” and “Harris” were the same name, for it had become usual, with the present generation, to add the final “s,” thus “David” became “Davis,” “Jenkin” “Jenkins,” “John” “Jones;” that if advantages were taken of such slight informalities in County Courts, it would be hardly possible to succeed in criminal suits; that it was important to public morals that such a scandal, if it existed, should be suppressed; and, therefore, admitted the articles, reserving to the party any advantage from want of proof of identity.

(a) This averment was negatived by the evidence of George Thomas, and John Dunn, the two parish officers. Thomas deposed, that “Reed did not then or ever to the deponent acknowledge that he was the father of such child;” and the evidence of Dunn was to the same effect.

parish; that during the whole or greater part of the aforesaid period, to wit, during the several years (1812 to 1825 inclusive), and the present year 1826, or at least until the citation issued against you in this cause, you have been living in the same house, and in the constant habit of sleeping at nights together in one and the same bed, and have frequently had the carnal use and knowledge of each other's bodies, and thereby committed the foul crime of incest."

The fourteenth, fifteenth, sixteenth, and seventeenth articles pleaded the usual and formal averments, and the articles concluded by praying, that the defendants "might be duly and canonically punished and corrected according to the exigency of the law, and be condemned in the costs of the complainant."

To these articles a responsive allegation was given, on the part of the defendants, and admitted without opposition. The substance of this plea may be gathered from the judgment of the Court.

Twelve witnesses were examined in support of the articles and exhibits, and thirteen upon the allegation; and the argument principally turned upon the credit due to the testimony of Ann Lewis, the only witness, examined by the Promovent, who spoke directly to acts of criminal familiarity; and whether the Court could act on the evidence of a single witness, though corroborated by circumstances of strong suspicion.

*Lushington* and *Aldams* contended, that the exception taken to Lewis was to her character, and not to her evidence; and that, after interrogatories had been administered, the ancient doctrine of these Courts was, that the witness was not open to exception. Her evidence also was probable in itself, and consistent with the admitted facts in the cause; though it was true, therefore, that she was a single witness, yet her evidence being corroborated, was sufficient to make out the charge: this had been decided in the case of *Wheatley v. Fowler*, on an appeal from Norwich, where the appellant (the original defendant) had been articted against for adultery, and found guilty on the evidence of a *particeps criminis* in conjunction with some corroborating circumstances. In the Arches, the judgment of the Court below was sustained, and these concurrent sentences were afterwards affirmed, with 100*l.* costs, by the High Court of Delegates(*a*).

*Jenner* and *Haggard*, for the respondents, argued that, in a criminal suit, the asserter of the charge was bound to establish it; and *that*, more especially, in a case of this description, where the proofs should be strict and full in proportion to the enormity of the accusation, and the penal consequences it involved. Here the proof of the charge rested on the sole testimony of a witness who had discredited herself, and whose character and evidence were completely destroyed.

In respect to the case of *Wheatley v. Fowler*, it appeared,—that *Wheatley*, a methodist preacher at Norwich, was articted against by *Fowler* for adultery and fornication with *Fowler's* daughter *Mary Mason* (before her marriage), and for other excesses; that *Mason* having been previously prosecuted, had upon the confession of the crime, been enjoined penance(*b*); and that this was alleged and admitted when she was

(*a*) *Wheatley v. Fowler*, Delegates, 1758.

(*b*) The Court of Arches rejected, with 50*l.* costs, an allegation exceptive to the credit of *Mary Mason*, in which it was alleged, "that she had not performed any public or private penance for the crime of pretended adultery which she had confessed to have committed."

produced, on a compulsory, in support of the articles; and that interrogatories were addressed to her. The corroborating circumstances, too, in that case were:—that, on two several occasions, Wheatley acknowledged to Paul and Keymer, two of the elders of his congregation, and who were examined on the articles—that the charges were well founded. He had also been seen in most indecent postures with three other women—and displaying his own person, and theirs, in a most offensive manner(*a*).

In that case then, the witness, previous to her examination, had been restored to credit, and that, in confirmation of her evidence, there was *fortissima probatio*—the confession of the party himself.

#### JUDGMENT.

Sir JOHN NICHOLL.

The full argument, which the Court has heard, has brought the true point of this case into so narrow a compass, that it is unnecessary to state either the proceedings, or the evidence, at any length. It is a suit for incest brought against the two defendants, Reed and Harris, who stand towards each other in the relation of uncle and niece; the relationship is fully established—it is not indeed denied that Alice Harris is the daughter of Reed's sister; and the only question then is, whether the incestuous intercourse is proved.

It has been justly observed, that the charge, if true, is highly criminal and scandalous; that it would subject the party to a severe punishment—to excommunication, which, by a late act(*b*), is commuted for “such imprisonment, not exceeding six months, as the Court, pronouncing or declaring a person excommunicate, shall direct;” and that, therefore, the proof of the charge must be clear and full.

The incestuous connection is alleged to have commenced in 1809, and to have continued till the promotion of the present suit. During a part of the time Reed's wife was living, and in the same house, so that there was adultery aggravating the incest—that circumstance increases the demand for proof by diminishing the probability of the fact. It may seem strange, that if this infamous connection had been so long subsisting—for fifteen years—no person in the neighbourhood should sooner have attempted to abate the scandalous and offensive nuisance; and that the suit should remain to be at last brought by an attorney, living at four or five miles distance, between whom and the uncle there had been various litigations on other subjects. It may happen that the uncle, though a gentleman of some property, may be more immediately surrounded by persons of lower degree not very ready to take up such a matter—for instance, his tenants, or farmers—that he may have little or no intercourse except with his inferiors, who, even if their notions of decency were outraged, might not choose to engage in litigation with him. The suit, certainly, does not appear to have been brought, at last, free and clear from a suspicion of other motives than a wounded sense of moral feeling. These considerations, in several views, do not diminish the necessity of strict proof.

That any act of criminal intercourse was ever seen is not suggested;

(*a*) The defendant was enjoined a solemn and public penance, to be performed in a linen cloth, with a paper writing, denoting his crimes, fixed on his breast, in the usual manner.

(*b*) 53 Geo. III. c. 127, s. 3.

no indecent familiarity; no personal liberty; nothing, which—in proceedings of a different nature—is termed a proximate act, is alleged; but it is fully proved that, for fifteen years, Reed and Harris slept in the same room—in which however there were two beds.

There is indeed one witness, and one witness only, who deposes that they slept constantly in one and the same bed, and that she had seen them in bed together—that witness is a woman of the name of Ann Lewis, who deposes,—that about ten years ago (about 1817), she went to live in Reed's service as maid of all work—she lived there about seven years,—and that, *during the whole period*, Reed and Harris slept in one and the same bed together every night. She adds particular reasons for believing criminal acts, and states, “that she has frequently seen them in bed together.”

If this witness is believed, her evidence, slightly corroborated by circumstances, would afford a sufficient proof of the crime: but her credit, and character, have been excepted to in plea; and two witnesses have been examined, who, “having heard her give evidence at Cardiff on the inquiry [an inquiry arising out of a dispute between Reed and Griffiths, the parties in this suit], do not hesitate to depose that Ann Lewis is a person not to be believed on her oath.” In that cause Griffiths failed, and Reed recovered against him damages to the amount of 150*l*. Now this goes far to remove the testimony of Ann Lewis out of the case.

I may also mention that this witness, it appears, after she had quitted Reed's service, became servant to Griffiths:—but this is not all—she positively asserts that they slept constantly and openly together, “the same as if they had been husband and wife”—she does not even mention that there was a second bed in the room; but there are other witnesses produced—two by Griffiths himself, who had been Reed's servants, Leyson and Hopkins, deposing that they, Reed and Harris, “slept in separate beds, and that they never had any reason to believe, that they slept in the same bed.”

These witnesses were not in Reed's service at the same time with Ann Lewis; but there is a witness produced by the defendants, Mary Evan, who was Reed's servant for six months, and who was there a considerable time with Ann Lewis; for she states that Ann Lewis, not being able to get a place, was allowed, from charity, to remain at Reed's during the winter, and Evan's testimony is, that there were two beds—that each was slept in, and “she has no doubt that Reed slept in one, and Harris in the other, and she has no reason to believe, or suspect, that they were ever criminally connected.”

It is difficult to reconcile Ann Lewis, and Mary Evan—which tells the truth, or what degree of credit is due to either, need not be decided: the burden of proof lies on the promovent, and it may be difficult to place great confidence in many of the witnesses; but, looking to all the preceding circumstances, respecting Ann Lewis' credit, and to the whole tone and tenor of her deposition, I am of opinion she is a witness to be laid very much, if not altogether, out of the case.

Is there, then, other evidence upon which the Court can convict the defendants? There are facts, which cannot be denied, exciting suspicion—violent suspicion—of the crime charged. The very circumstance of their sleeping in the same room, even in separate beds, is scandalously indecent, unless under the pressure of absolute necessity from extreme illness, or abject poverty. The latter excuse cannot be set up. Reed

is stated to be a man of property,—his house had several rooms in it with beds in them;—but what is the defence and explanation?

In 1809 Reed had a violent paralytic attack, was extremely ill—probably in some danger for a time, and in a senseless state: his wife suffered something of a similar attack about the same time: she, therefore, could not attend him; on the contrary, she required the maid-servant to attend her. In this distress the niece was sent for to assist in waiting upon her uncle—the defendant, and Mrs. Reed was very glad of her arrival.

Thus far there arises no suspicion, and there might be no impropriety, so long as the violence of the paralytic attack continued unabated: though, considering that the niece was a spinster of thirty-three years of age, and that the uncle was only about sixty—perhaps a married woman of the village, of more advanced age, might have been a person more proper, and decent, to attend him as nurse, to sleep in his room, and to do all offices required for him; but it might be pushing refinement, and delicacy, too far to impute any suspicion to this commencement of her sleeping in his room.

But the violence of this particular attack which (so long as it continued undiminished) extinguished suspicion, was soon got over: he recovered—he never had a second attack—he was restored so far as to be able to walk about the village with a stick—to ride on horseback, being assisted on and off—to ride to market, sometimes attended, sometimes alone: he could go to Cardiff, to be present at the writ of inquiry, nay—he seems to have gone to the Assizes at Hereford,—a distance of sixty or seventy miles. Whether he had any person, on these occasions, to sleep in his room does not appear, but it is in no degree made out, that his bodily infirmities were such as to justify the indecency of having a young female to sleep constantly in his room. If he required any assistance in the night, either to administer medicines (which is not proved), or for any other purpose, the unseemly indelicacy might have been avoided by the female sleeping in some other room, and by having a bell put up, instead of his knocking, or poking with his stick; for, if Alice Harris were hard of hearing, the other servants were not. The mere fact, then, of her sleeping in the same room, though in another bed—she about thirty-three—he about sixty—is, of itself, not only indecorous, but suspicious; but this suspicion becomes extremely violent when some other admitted facts are adverted to.

On the 18th of December, 1811, Alice Harris was delivered of a female child, who died in infancy: she removed into another room—the best room—only for the purpose of lying in—and, as soon as her confinement was over, she returned to sleep in Reed's room—during her absence no other person slept in his room—the necessity was not sufficiently urgent to require any person, as far as appears by the evidence of Leyson. The parish officers were on the alert to get the child sworn, in order that the parish might not be burdened with the maintenance of it: Reed prevented this, and a joint bond, from his son and himself, was given to the parish. This bond was at first objected to, because the father of the child was not named; but upon its being re-executed, and attested by a neighbouring attorney-at-law, the bond was accepted.

There is no evidence that, at that time, Reed acknowledged himself expressly to be the father of the child, nor that he, or Alice Harris, has since so acknowledged, except the testimony of Ann Lewis, to whom I

cannot venture to give any credit on that circumstance: but these facts lead to a violent suspicion that Reed was the father, and that suspicion is much strengthened by no other father being assigned to this moment. It is suggested that there might be reasons for not disclosing the father; and that young Reed, the son, might be the person. No satisfactory reason can be advanced sufficient to counterbalance the odium, and scandal, of allowing the suspicion to remain, that this child was the fruit of an incestuous connection between the uncle and niece. If young Reed were the father, there is no incest—he was only her cousin; but neither the facts, nor the conduct of the parties, support such an explanation: there is no proof that the son was living at home—there is no proof of any resentment shown towards either the son, or the niece, on account of this child,—on the contrary, the father and son join in the bond; the niece remains in the house; she is allowed to be confined in the best bed-room, and, as soon as she recovers, she returns to sleep in the bed-room of her uncle; and, even now, when prosecuted for incest, no other father of the child is set up, or suggested, though it would have been a complete defence to the strongest circumstance in the charge.

If the parish officers had been as alert in supporting the moral character, and public decency of their parish (of which the churchwardens are to a certain degree the guardians,) as they were in protecting the parish against the maintenance of the child; and if they had, at that time, brought a suit, *recenti facto*, to put an end to this scandal and nuisance; and, in defence, there had been no other father assigned, the circumstances might have gone far to establish the actual incestuous connection. But when neither parish officers, nor respectable neighbours, come forward; when the matter is allowed to rest for thirteen years, and is at last taken up under the feelings, and occurrences, that attended the commencement of the present suit;(a) when all the witnesses, who were servants in the house, with the single exception of Ann Lewis, swear they never saw any indecency, nor any thing to lead them to suppose that the defendants did not occupy separate beds—when they will not depose even to a belief of a criminal intercourse—it is possible that no act of incest may have taken place; and that this highly suspicious and indecorous course of conduct may have gone on from not entertaining a due feeling of its impropriety;—it is possible that the uncle—having no sense of decency, nor regard for his own character, nor for that of his niece (whose reputation was already destroyed by the birth of this child,) might persevere in setting public opinion, and the scandal of the example, at defiance, rather than forego the convenience of having her to sleep in his room. This is possible; and I can hardly venture, on the present evidence, to decide that the charge is proved,—a decision which would impose upon the Court the duty of pronouncing excommunicate,

(a) It was proved that, in an action of trespass brought by Reed against Griffiths and others, and which stood for trial at the Summer Great Sessions for the County of Glamorgan, in 1824, the defendants withdrew their plea, and suffered judgment to go by default; and that a writ of inquiry was afterwards executed before the Sheriff and a jury, when the damages were assessed at 150*l.*, besides the costs. It was also proved, that in June, 1824, a suit of the same nature as the present, had been instituted in the Court of Llandaff, at the promotion of William Rees (at that time servant to Griffiths,) against the same defendants; from which they were dismissed.

and through the medium of a *significavit*, of consigning to a prison, for a period not exceeding six months, both the niece and this old man, now at the age of seventy-six years, and under very great bodily infirmities:—he is too near the grave for such a step, if an imperative duty does not call upon the Court to take it.

But although I shall dismiss the parties, I shall certainly not dismiss them with costs. Here is a violent presumption proved. The old rule of practice, as laid down by Clarke, is, that if neither the charge, the "*crimen objectum*," nor violent suspicion of the charge, "*vehementes præsumptiones criminis objecti*," be proved, the party accused shall be dismissed with costs, *una cum suis expensis*; but if public fame, or vehement presumptions are proved, and the defendant be required to produce compurgators (*ob quas purgatio indicta fuerit*), then the defendant may be condemned in costs (a).

The "*purgatio indicenda*" is now a practice become obsolete; and the matter of costs is left much in the discretion of the court, upon a just consideration of all the circumstances of the case. If this suit had been brought by the Parish Officers, or by some neighbour, apparently from a sense of moral duty, I might have felt myself bound to adopt the latter rule, and to have condemned the defendants in costs; for here is a vehement suspicion proved. But—remembering how many years have been allowed to elapse—remembering also the occurrences which manifestly induced the bringing of this suit,—I shall arrive nearest at the justice of the case by dismissing the defendants—leaving each party to the payment of their own costs.

(a) Vide Clarke's praxis, tit. 331, 332.—Also Oughton, tit. 149, and tit. 150. s. 7.

## PREROGATIVE COURT OF CANTERBURY.

PARKER v. HICKMOTT AND PARKER.—p. 211.

### On Motion.

On the testator's death, an alteration appearing in a will which, during his lifetime, was in the custody of the writer (one of the executors),—who swore such alteration was made by the testator's concurrence, but gave no further explanation, and declined to propound the will so altered,—the Court will assign the executors to take out probate of the will in its original state, the residuary legatees—on being personally cited to propound the will, or to show cause, &c.—not appearing.

JOHN PARKER, late of Seven-Oaks, died in the month of May, 1827; leaving a will regularly attested, and dated 11th of December, 1826, whereby he devised his freehold estate to his brother Henry Parker, charged with an annuity of 25*l.* to his (John Parker's) wife for her life. He also, among other bequests and legacies, gave to his wife a legacy of 1,000*l.* The deceased appointed his brother, Henry Parker, and William Hickmott, executors.

The will was written by Henry Parker, who had the custody of it

during the life of his deceased brother. On the will being produced, there was a manifest alteration of the widow's legacy, the words *one thousand* having been erased, and the words *six hundred* written upon the erasure.

Henry Parker stated in an affidavit, that the legacy was reduced by the desire, and with the concurrence, of the testator; but gave no further explanation.

A caveat having been entered on the part of the widow; the same was warned: but the Proctor for the executors having declined to propound the will in its present state, a decree issued, at the instance of the widow, against the residuary legatees (Henry Parker being one), citing them to propound it in that manner, or to show cause why the executors should not be assigned to extract a probate of the will, as originally written, with the said legacy of 1,000*l.* reinstated.

This decree having been personally served; and no appearance given—

*Jenner*, on behalf of Mrs. Parker, moved the Court accordingly; and that the costs of the widow should be paid out of the estate.

*Per Curiam.*

It is not stated when the erasure was made:—but there being no party before the Court who prays probate of this will with the alterations; and a decree with intimation—issued under seal of the Court—having been personally served—I shall allow the probate to pass agreeably to the tenor of the decree; and direct the costs of the widow to be paid out of the estate.

Motion granted.

## IN THE GOODS OF JOHN HOWE.—p. 212.

### *On Motion.*

When pencil alterations are inferred to be deliberative, probate in common form will be granted of the paper, without such alterations; the only party materially injured by such grant, having executed a proxy of consent.

JOHN HOWE, late of Hoxton, died on the 25th of November, 1825. By his will duly made and executed on the 27th of April, 1824, he appointed John Faulkner and James Hall, executors. Ann Elizabeth Buckle, spinster (now the wife of George Passingham), was the residuary legatee.

On the 24th of November 1827, the testator was attacked with paralysis, and continued insensible till his death on the following day. The will was found by Mr. Faulkner (within a few hours of the deceased's death), locked up in a cupboard with his plate, and other articles of value, and with his papers of moment and concern. The will was in an envelope with the seal broken. Upon being opened several erasures and interlineations, made in pencil, and very indistinct, were discovered; and it was presumed they were made by the deceased, who had informed Mr. Faulkner that he contemplated some alterations in his will. These alterations were—with the single exception of an increase of a legacy of 75*l.* to 100*l.* to one of his nephews—in favour of the residuary legatee. The property of the deceased was under 2,000*l.*

*Addams* moved that probate should be granted to the executors without the pencil marks; the residuary legatee having consented, and executed a proxy to that effect.

Motion granted.

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ARBERY v. ASHE.—p. 214.

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*On the Admission of an Allegation.*

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The Court will not, at once, reject an allegation propounding a will, which sounds to folly, when facts are pleaded, showing that the deceased, up to his death, conducted himself, in the ordinary concerns of life, as a sane man.

THE Reverend Robert Hoadly Ashe, late of Crewkerne, in the county of Somerset, died in May, 1826, leaving a widow (since dead), and several children. In June following, letters of administration, as if he were dead intestate, were granted by this Court to Charlotte Hoadly Ashe, spinster, one of his natural and lawful children. In September last, a decree was extracted at the suit of Elizabeth Arbery (wife of John Arbery of Weymouth), calling upon Miss Ashe to bring in the letters of administration, and to show cause why the same should not be revoked; and administration, with a will (as asserted) of the deceased annexed, be granted to her as the universal legatee.

In support of this paper an allegation, consisting of ten articles, of the following effect, had been brought in; and its admissibility was now debated.

1. That the deceased died, at the age of seventy-five, leaving a widow, and Charlotte Hoadly Ashe, spinster, and others his natural, lawful, and only children; that he was Rector of Misterton in the county of Somerset, and also perpetual curate of Crewkerne in the said county; and had so been from 1775; that the widow and children of the deceased, save William Hoadly Ashe (one of his said children) quarrelled with the deceased about sixteen years before his death, and during all that period resided separate and apart from him, and, to the time of his death, were never reconciled to, nor had any communication with him; that his property amounted to 1500*l.*, and that the widow and deceased's children were possessed of property entirely independent of him.

The second pleaded,—that William Hoadly Ashe resided at Crewkerne with his father (the deceased), who manifested on all occasions the most parental affection for him; that from and after the death of the said W. H. Ashe, who died at Crewkerne on 4th February, 1818, the deceased (Dr. Ashe) often declared, in the presence of divers credible witnesses, “that his family, meaning his wife and children, should never benefit by him; should have none of his property; and that he would rather give it to a stranger:” and he also often declared he intended to bequeath his property to Mrs. Arbery.

The third—after pleading the *factum* of the will; and that it was in the deceased's own hand-writing—“that the deceased did, on the day of the date thereof, after he had drawn and prepared the will, walk to the Swan Inn in the village of Misterton (at that time and now kept by Mary Rendell, the aunt of the party proponent), where he had been in the

habit, for upwards of fourteen years, of visiting and holding his annual audit, and receiving his tithes; that after he had arrived at the inn, he took out of his pocket his said will, and then, in the presence of several persons, signed it, and published and declared the same to be his last will and testament." The article then pleaded the attestation, and that the deceased was of sound mind.

The fourth—that after the execution of his will, he folded it up in an envelope, which he sealed and addressed to Mrs. Arbery; and then left it in the custody of her cousin, Susan Rendell—and requested it might be given to the said Elizabeth Arbery; which was accordingly done.

The fifth pleaded the great age and blindness of Mrs. Rendell; and that on the day aforesaid the deceased also brought with him a paper-writing, which he said required to be signed by the Churchwarden of Misterton, for procuring an allowance for her from the blind institution in London, and that the deceased had been in the habit of preparing for her similar papers for many years.

The sixth pleaded the hand-writing of the instrument propounded.

The seventh—"that the deceased, some time after he had so executed his will, whilst conversing with Mrs. Arbery respecting it, expressed himself, in the presence of credible witnesses, as follows:—'I never will make another will, as I am a minister of the gospel; and mind, as soon as I am dead, that you come and take possession of your property.'"

It was also pleaded, that the deceased, though somewhat eccentric in his conversation and habits, was at all times, till his death, of sound mind; that for fifteen years preceding, and for some time after, the making his will, he invariably performed divine service, preached, administered the holy sacrament, and did all the duties of incumbent of Crewkerne and Misterton, and managed all his own concerns.

The ninth—that neither the party proponent, nor her husband, heard of the death of the testator until some time in June last, when she was informed that letters of administration to his effects had been granted to Charlotte Hoadly Ashe, the other party in the cause, who had possessed herself of his property.

*Lushington*, for the allegation.

*Dodson*, *contra*.

JUDGMENT.

Sir JOHN NICHOLL.

The paper propounded in this cause is a most extraordinary one; more especially with reference to the deceased, and considering his condition and station in life. It is in these terms:—

I promise & swear that I will give all my Plate—Watch & Seals—Rings and all that I have in the World—at my decease—

I promise and swear that I will give Elizabeth Arbery—at my Decease, all that I have in this world or ever shall have in wtaver in money or lands—

Robt. Hoadly=Ashe D. D.

Witness Elizabeth Cleal

our hands Martha Rendell.

Dec. 14th, 1824.

A paper—couched in these strange terms, and written in this strange manner, coming from a person of education—raises a great doubt—whe-

ther it could have been the offspring of his mind when sound. The custody also of the paper, when sent to Mrs. Arbery, has been careless; for it is in a very torn and shattered state: this shows that she had no great confidence in its validity; and the delay of twenty-one months in producing it leads to the same inference. The whole proves, that Mrs. Arbery has a very arduous case to make out, in order to establish that the deceased was of sound mind at the time of the execution; still I do not know that the Court, on the face of the paper, can, positively, pronounce that he was not so. Mrs. Arbery may, perhaps, do well to consider whether she will not give up the pursuit. It may be of some benefit for her to relinquish this paper:—in persisting in this undertaking she will incur a considerable risk of expense, as if it is shown that he was insane at any previous time, the appearance of the paper itself may be sufficient to condemn it.

There may, however, be facts accounting for the disposition. It is pleaded, that his family had a separate and independent provision—though its nature or amount is not stated; nor does the allegation describe what was the sort of intimacy the deceased kept up with Mrs. Arbery, nor give any reason why she was selected as the object of his bounty. It is also pleaded, that he brought this paper to the place where he usually held his audit, and there he executed it: there is nothing extraordinary, or unnatural, perhaps, that he should direct it to be delivered to the party benefitted. It is also alleged, that he, subsequently, recognized it as his will, and declared he would make no other; and, it is further pleaded, that, after the execution of it, he continued to perform divine service in the parish church, and to administer the sacraments.

The whole tenor and shape of the paper very strongly “sound to folly.” Swinburne—in the passage that has been quoted—thus states the law: “If in the testament there be a mixture of wisdom and folly, it is to be presumed that the same was made during the testator’s frenzy, insomuch that if there be but one word sounding to folly, it is presumed that the testator was not of sound mind and memory when he made the same”(a).—Such is the doctrine of Swinburne; but it applies only to the case of a person who is sometimes sane, and sometimes insane; and of whose state when he wrote his will there is no direct proof. I cannot, therefore, on the face of the paper, reject it at once, and pronounce the man insane in opposition to such conduct in life as I have before referred to; but I strongly recommend an arrangement out of Court.

As, in cases of married women, there should be some security for costs, the husband must, of course, join in the proxy, more especially here where the woman is in a low condition of life, and the property amounts in value to 1,500*l*.

Allegation admitted.

(a) Swinburne on Wills, part 2, s. 3, *ad finem*.

In the Goods of ARMINE ANNE DYER.—p. 219.

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(On Motion.)

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Probate may be granted in common form of a will written entirely in pencil by the deceased, who, a few days before death, declared she wished it to operate, unless altered.

THE deceased, on the 26th of December, 1827, died at the age of about 80 years, a spinster—possessed of personal property amounting to 3,000*l*. She left four persons entitled in distribution in case of an intestacy.

On the 20th of December, and on a subsequent day, the deceased spoke of her will—described where it would be found—and said, that she had appointed her nephew executor; and that she intended the same should operate unless she altered it. Upon her death, a few days afterwards, a will—written in pencil, entirely in the hand-writing of the deceased, and dated on the 21st of July, 1823—was found in conformity with her declarations.

*Lushington*, on affidavits of these facts, moved that the paper should be admitted to probate.

*Per Curiam*.

By granting this motion, the Court will, of course, not preclude any one interested in the property from contesting this paper at a future period; but if the contents of these affidavits are true (and the Court has no reason for doubting them), the paper is clearly valid. The application, however, would have been stronger, if it had been accompanied by the consent of those interested under a prior will, and who may be prejudiced by its revocation.

Motion granted.

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STANLEY v. BERNES.—p. 221.

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On Motion.

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In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court will not dispense with such administrators entering into a joint bond.

THIS was an application to the Court by both parties to grant an administration, *pendente lite*, jointly to James Campbell, agent of Mr. Bernes, and William Collins, agent of Mr. Stanley, and limited to recover the sum of 14,800*l*. due to the estate of John Stanley, the deceased; of which 6,900*l*. were due from Mr. Campbell, and 7,900*l*. from Baring, Brothers and Company; also to receive the dividends on certain stock standing in the deceased's name; and the Court was further asked to permit the administrators, instead of entering into a joint administration bond for the property, so limited, to enter into separate bonds, each to the amount only of a moiety of the limited property.

*Lushington* and *Addams*, counsel for Mr. Stanley.

*Jenner* and *Phillimore*, for Mr. Bernes.

*Per Curiam.*

The state of the property renders such an administration necessary. Many of the facts are pleaded to have occurred, and must be enquired into, in a foreign country; and, consequently, much time may elapse before the case is heard. The administration, however, should be limited, not only to recover, and to receive the several sums, but also to invest them in the public funds.

The prayer that the administrators may give separate bonds, is quite a novel application—I can see no necessity for it, nor would any advantage result, because administrators must always act jointly; they cannot, like executors, act independently. The Court, therefore, can discover no reason for departing from the rule hitherto universally observed. Administrators *pendente lite*, are the appointees of the Court, and are not to be merely considered as the nominees, or agents, of the several parties on whose recommendation they are selected.

Limited administration decreed—the usual security being given.

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In the Goods of JOHN HERNE.—p. 222.

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(*On Motion.*)

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Administration with a paper annexed—wherein were sundry alterations in the body, a blank left for the date, and which appeared, from internal evidence, to have been written more than nine years before death, and was endorsed “outline of the will”—cannot be granted, in common form, on the exhibition of a proxy of consent from all interested under an intestacy, there being no evidence to rebut the presumption that the paper was deliberative.

JOHN Herne—formerly of Islington, in the County of Middlesex, but late of Woolstone in the County of Warwick—died a bachelor on the 1st of December, 1827, leaving Mary Whiteman—wife of William Whiteman—and Elizabeth Davis, widow, his natural and lawful sisters, and only next of kin, who, with four nephews—the children of a deceased sister, Eleanor Johnson—were the only persons entitled in distribution to his personal estate, of the value of between 4,000*l.* and 5,000*l.*

After his death a paper, of which the following is a copy, was found:—

J Jno Herne of Islington in the county of Middlesex, by this his last will devises to the Overseers & Churchwardens of his native village Woolstone in the County of Warwick <sup>for to have</sup> the sum of five guineas per ann. to be secured to them in trust out of <sup>his</sup> *\*my\** real estate at W. aforesaid for the benefit of the poor in the said villag <sup>industrious</sup> of Woolstone and given to them in such portions as the Churchwardens and Overseers <sup>for the time being</sup> shall deem equitable and just the first annual payment of five Gui<sup>s</sup> to be made to them on the 25<sup>th</sup> day of Jan<sup>y</sup> next following <sup>his</sup> *\*my\** descease and the like sum of 5 Gui<sup>s</sup> on every succeeding 25<sup>th</sup> day of Jan<sup>y</sup> for ever perpe-

\* The words in *italics* were stricken through with the pen.

tuall<sup>y</sup>. The remainder of <sup>his</sup>\*my\* real estate and all other <sup>his</sup>personal property (a) he gives to <sup>his</sup>\*my\* two sisters Sarah Handcox and Mary Whiteman <sup>his</sup>\*my\* four nephews Mc<sup>l</sup> W<sup>m</sup> Charles and John Johnson <sup>his</sup>\*my\* Niece Ann Fowler <sup>his</sup>\*my\* Niece Eliz. Johnson <sup>and his</sup>\*my\* two Neph<sup>s</sup> died 20th Decr. 1817.  
 \*Aaron and\* John Herne to be equally divided among them, or so many of them as may be living at the time of <sup>his</sup>\*my\* <sup>he the said testator</sup>descease and <sup>his</sup>I appoint <sup>his</sup>\*my\* nephew John Herne sole Ex<sup>r</sup> of this <sup>his</sup>\*my\* last will and testament in testimony whereof <sup>he</sup>I the said John Herne has (b) hereunto set and affixed <sup>his</sup>\*my\* hand and seal the — day of —  
 JOHN HERNE.

(Endorsed.)

Outline of the Will of John Herne  
 of Islington in the County of Middlesex  
 3<sup>rd</sup> Jan<sup>y</sup> 1818.

The search among the deceased's papers, the finding, the handwriting, the interlineations, signature, endorsement, and that no other testamentary paper could be discovered, were fully set forth in affidavits; and proxies—from Mrs. Whiteman, and her husband; from Mrs. Davis; and from two of the nephews—were exhibited, consenting that administration, with the paper annexed, should be granted, in common form, to Michael, and Charles, Johnson—the other two nephews.

It also appeared that the sole executor died in the life-time of the deceased.

*Nicholl*, in support of the motion.

The body of this paper is dispositive, and any variation from the usual form may be accounted for by the apparent want of education in the writer. A difficulty arises on the face of the paper from the interlineations—the omission of a date in the body of the instrument—and the use of the words “outline of the will” in the endorsement; but the doubt, arising from these circumstances, is rebutted by the care with which the paper was preserved. “Outline of”—does not point to the intention of any subsequent act so strongly as either “plan designed for” in *Matthews v. Warner* (c); or “what I purpose to be” in *Roose v. Mousdale* (d)—it is tantamount to “this is my will expressed summarily:” and though a proxy of consent only dispenses with formal evidence, yet, where the case is nearly in equilibrio, it will be of some avail as showing the opinion of those best acquainted with the deceased's intentions.

*Per Curiam.*

I cannot, consistently with the rules laid down on former occasions, grant this motion (e). The rule is this:—if an imperfect paper is supported by affidavits stating facts which, if established by plea and proof,

(a) The words “he gives” were originally written “I give.”

(b) The word “has” was originally written “have.”

(c) 4 Burn. Ecc. Law, p. 107; also 4 Ves. jun. 186.

(d) 1 Addams, 129.

(e) Vide in the goods of Tolcher, deceased, 3 Add. 16.

would render the paper valid, that then, on a proxy of consent, the Court will grant its probate. In the present instance the affidavits do not furnish sufficient facts. The instrument, on the face of it, is imperfect, and even converted into a deliberative paper by the deceased himself: true it is, that it is signed,—but when—does not appear—there is a blank left for the date. The inference is, that when he signed it, he intended to do something more, and that his signature was placed there when it was first written. It is now in a different state from what it originally was—it then was in the first person throughout down to the very last paragraph, it was afterwards changed to the third person, and, on the outside, are these words:

“Outline of the will of John Herne of Islington in the County of Middlesex, 3d Janr 1818.”

It, therefore, is probable, on the face of it, that when this endorsement was made the paper was intended only to be deliberative; even this is nine years before his death, and, from the erasure of Aaron Herne's name, and the interlineation above, it appears, that it was written some time previous to the 20th December, 1817: consequently it is to be inferred, that the deceased did not intend it to take effect in its present form. This is the presumption of law in every unfinished paper, and that presumption is always held to be strengthened when the paper, as in the present instance, purports to dispose not only of personal, but also of real, property, as to which it clearly must be inefficient. Some recent recognition would then be necessary to render it operative: if it could be shown that shortly before his death, he had so referred to it as an existing will, that his intention would be carried down to that time, the case would be altered; but there is nothing of the kind later than the date. The affidavits only allege that it is in the hand-writing of the deceased, and was found among a bundle of papers in a box; but that it was not known how long it had remained there.

It would then be too much, on the consent of parties—not aware perhaps of their interests—to allow the administration with this paper annexed to pass the seal. The Court is bound to protect those who may give an unguarded consent. To grant this motion would not only be going further than precedents authorize the Court, but would be a departure from them, and from principle. I, therefore, reject the motion.

Motion rejected.

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ROSS, *otherwise* RUSS, *v.* CHESTER.—p. 227.

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If no suspicion of fraud exists, a will—consistent with previous affection, and declarations, and supported by recognitions and circumstances showing volition and capacity—is valid, though made in *extremis*, and though the instructions were conveyed through the party benefitted.

JUDGMENT (a).

SIR JOHN NICHOLL.

This case arises upon a will made *in extremis*—almost in *articulo mortis*; the validity of which must depend on satisfactory proof of volition and capacity. The account given by the witnesses is, generally, fair, and there is no suspicion of fraud or circumvention. The paper is

(a) *Addams* for the will—*Lushington* for an intestacy.

in the hand-writing of Joseph Searle, one of the attesting witnesses: it is propounded by Mrs. Ross, and opposed by Mrs. Chester—the cousin and sole next of kin of the deceased. The property is very small, amounting only to 250*l.*—it would have been far better, in such a case, that the parties should have come to a compromise; but there being now no hopes of such a conclusion, it is my duty to decide the question judicially.

The deceased was a widower; and Mrs. Ross was the second wife, and widow of his father. Since the death of the latter, the deceased and Mrs. Ross had lived together for nearly forty years; he entertained for her the greatest affection and regard; while, with his cousin, Mrs. Chester, it does not appear that he kept up any intercourse whatever. Hence it is probable that, if there was any will, he would leave all his property as a provision and support for the old lady—his mother-in-law; so Mumford says, that it was “the general impression that Mrs. Ross was to have what the deceased possessed.” It is in evidence too, that he made declarations to that effect.

Kingsbury deposes, that the deceased talked “of Mrs. Ross’s relations—never of his own—he never mentioned Mrs. Chester—he spoke of Mrs. Ross as the only person belonging to him.”

Searle states, that “about five or six weeks before his death, the deceased, speaking of Mrs. Ross, said—‘The poor old soul must make the best shift she could when he was gone, but she would be left tolerably well.’ ”

I can only construe this to mean “left tolerably well *by him*,” and to refer to the proposed disposition of his own property: I have still less difficulty in so construing it, when I turn to the account given by another witness, Peck, a neighbour and an intimate acquaintance of the deceased for nine or ten years—with whom the deceased used to sit, and chat while the witness (a shoemaker) was at work; for he speaks strongly to declarations of intentions.

“He has many times heard the deceased say, he should leave whatever he had to the old lady (meaning Mrs. Ross). He did not mention the lease of his house in particular, but the deponent, several times, asked him whom he meant to give it to, and he always answered—‘to the old lady.’ The deponent also spoke to him several times about the propriety of making a will, and the last time he did so was about five weeks before his death, when he asked him, ‘to whom he meant to give the lease of his house;’ and he replied—‘to the old lady, my mother-in-law, Mrs. Ross:’ deponent observed, ‘that’s right, for she’ll live longer than you or me, perhaps,’ and the deceased replied, ‘perhaps she may, Mr. Peck,’ and then added, “that she should have it, and he would not leave it to any one else.’ The deponent then told him he ought to get a will made, and he said, ‘he would, and would leave the old lady every thing he had.’ ”

Mrs. Searle, the wife of the writer of the will; also deposes to similar declarations:—

“Deponent on the said Thursday (the day on which the deceased was taken ill) went in to see him; and he requested her to sit down until Mrs. Ross should return. In the course of conversation, the deceased, speaking of his property, said, ‘I have got but little, but must leave it all to the old woman; for God knows what will become of her.’ ”

Nothing can be of greater weight than this affection, and these re-

peated declarations, in different parts of his life, when, in no degree, opposed or counteracted by any circumstances of a contrary tendency: they lay a strong foundation for this will, and supply proof of intention, even if capacity, at the time of doing the act, were in any degree doubtful.

I approach, then, the day of his death. His illness, which had been short, had only confined him to his bed for a few days, and was occasioned by a violent cold affecting his breathing, and producing asthma—this accounts for his speaking but little: in the morning, Searle, the husband of his nurse, went for his friend Pulteney, as the deceased wanted him very particularly; not being able to see him, he went a second time, and Pulteney could not then come, for he was obliged to attend a vestry: on communicating this to the deceased, he exclaimed, “Oh my God! what shall I do! I must resign it to the will of God, and Searle;”—but he did not say what it was he meant so to resign. This is the result of the evidence of Searle on the second article; and of Mrs. Searle on the fifth interrogatory.

As far as this goes, it is uncertain what he was to leave to “God and Searle;” but it shows that the whole affair originated with the deceased, and that he had an anxiety to do what he sent for Pulteney to do. Coupling, however, all the circumstances together, I cannot but think that the capacity of the deceased, on that morning, was beyond doubt, and that his object in sending for Pulteney was to effect some testamentary act; more particularly when I advert to what Mumford says. Searle allows that his own account is somewhat imperfect, and gives, as a reason, that he was very ill at the time of his examination, so ill, indeed, that he was not able to undergo a cross-examination, in which he might, perhaps, have given a fuller explanation(*a*). His account to Mumford, *recenti facto*, is more intelligible; and to that I shall presently advert.

Here, then, if it be correct, is sufficient to infer that the object of sending for Pulteney was to make his will. Searle did not set about it till some time after; when the deceased getting worse, Mrs. Ross went up to Searle, and desired him to draw “a bit of a will as fast as he could.” Paper was procured, and Searle wrote the instrument.

Certainly there is no clear evidence of instructions, directly, for the act itself; the message was carried by Mrs. Ross to Searle; but there is evidence,—that the deceased knew what was going forward, and that his wishes accompanied the act—from Peck, to whom I have already referred; for when he called that morning, the deceased told him, “that Searle was writing his will”—and this is a species of recognition when his testamentary intentions are so clear. It is not material, nor singular, nor unusual, that the witnesses differ as to the hour at which the execution took place. On the second article, Peck thus deposes:—

“He went to ask the deceased how he did, about nine o’clock in the morning of the day on which he died: the deponent took hold of the deceased’s hand, and asked him, if he knew him: the deceased answered, ‘Yes, Peck, I know you very well;’ and then said, ‘the will’s being wrote: Searle, the lodger, is writing it upstairs:’ the deponent observed,

(*a*) Upon the death of this witness, a *motion* was made that his evidence might be received, although he had not been repeated, nor examined on interrogatories, when the Court directed that the consent of the adverse Proctor should be stated in acts of Court; and also, that the application was made, in this form, on account of the smallness of the property.

‘You have driven it off too long;’ and the deceased answered, ‘it should have been done before; but it was neglected when you talked to me about it before.’ Deponent is quite sure, that what he has just stated was what the deceased then said to him; and that he was then of a very sound mind, memory, and understanding.”

Now, unless this is direct perjury and fabrication, here is capacity, conversation, and recognition of the act at that time in progress. After this, very slight evidence of execution will suffice. The paper being written, Mumford, a neighbour, is sent for, and the will is carried to the deceased, but, before that takes place, Mrs. Kingsbury, coming in accidentally, is told by Mrs. Searle that “Searle was writing the will—leaving the house, and all that was in it, to Mrs. Ross:” she thus goes on:—

“Mrs. Ross then desired deponent to ask the deceased if he would like any body’s name to be put into the will, after her death; and deponent, in consequence, leaned over the bed, and said to him—‘Mrs. Ross very much wishes to know if you would like to put any body’s name in the will besides hers, after her death.’ [There was no attempt, therefore, to circumvent the deceased.] He, at first, made no answer; upon which the deponent repeated her enquiry in the same terms as before; and the deceased then said, ‘No, nobody.’ This is an intelligible answer: it shows he must have understood the question and the transaction—it is a sort of recognition of the whole act—it shows, also, the fairness of the proceeding: this must have happened before Mumford arrived, and before they proceeded to the execution. The will is brought—it is read over to the deceased—he is asked if he will sign it, and, according to Searle, he answers—‘No, no, I am not dead yet.’ If this was the reply, it shows some confusion of mind, or misunderstanding of the question; and Mrs. Searle also speaks to the same answer. That, no doubt, was their impression, and so Mrs. Searle seems to have told Mrs. Chester, for she has had conversation with her; but Mumford deposes to another answer which, possibly, the Searles might not hear. Mumford’s account is to this effect:—

“Deponent was sent for, and went to the deceased’s house, where he found him in bed. Searle was standing by the bed-side with a paper in his hand, and Mrs. Ross and Mrs. Searle were also present; deponent asked Searle what he had got in his hand, and he said, a paper he had been writing: deponent asked him how he came to write that paper, and he replied, that he had been into the Borough, at Ross’s request, for a Mr. Pulteney; but who was unable, at that time, to come; that when deponent told this to the deceased, he had thereupon said, ‘Then, Sirs, I must leave it to God and you to do it in the best way you can for the old woman’ (meaning Mrs. Ross). Searle further stated, that he had written a will for the deceased, which was the paper he had then got in his hand: deponent observed, that it would be proper Searle should read the will to the deceased: Searle assented, and accordingly read the will to the deceased audibly and distinctly; observing to him, as if in explanation of its contents, whatever there is, is for Mrs. Ross, upon which the deceased said, ‘Yes, yes.’”

This clearly points to a testamentary act—“Yes, yes,”—this is an express approbation of the contents upon not only a reading over, but a distinct explanation of the disposition. The pen was then put into his hand: Searle says, at first he could not hold it, but that, of his own ac-

cord, he picked it up, and, with the assistance of Searle, made his mark. This was not a necessary act—it would have been valid, though he was unable, from bodily infirmity, or from being overtaken by the stroke of death, to sign it, if the Court had been satisfied that he intended, and approved, the disposition. But here is the signature, such as he could make it; and Mumford, and Searle, afterwards witnessed it in testimony of his approbation. Mrs. Searle will not swear, either that he was capable, nor that he was totally incapable; but it is clear, from the interrogatory, that she has had much conversation with Mrs. Chester as to his answer “no I am not dead yet,” and is so committed to it, that she may feel some difficulty in speaking as strongly as she otherwise might to his capacity. But, looking to all the facts and circumstances; to his testamentary declarations, “that he should leave all to this old lady;” to his anxiety, that morning, to see Pulteney; to his exclamation “Oh my God! what shall I do? I must resign it all to the will of God and Searle” (when he learnt that Pulteney could not come); to his assertion to Peck, “that Searle was writing his will;” to his answer to Mrs. Kingsbury, “no, nobody,” when she asked “if he would like to put any body’s name in the will besides Mrs. Ross’;” to his saying “Yes, yes,” when the will was read over and explained; to his previous affections, and to general probability,—I am convinced, though this act was deferred till late, and was completed almost *articulo mortis*; yet that it was the mind and intention of the deceased so to dispose of his property, and that it is sufficient for carrying into effect his wishes in relation to his personal estate; I, therefore, pronounce for the paper.

As to the next of kin being allowed their costs out of the estate, they were, certainly, justified in entering into the investigation—considering the will was made *in articulo mortis*—and my only doubt arises from the smallness of the property—but, on the whole, I think they are entitled to their costs.

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In the Goods of the REVEREND SIR JOHN LIGHTON, Baronet.  
p. 235.

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*On Motion.*

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A testator having appointed two executors, and provided that, on the death of either of them, two others should be substituted:—on the death of the original executor—who had proved the will—and on a proxy of consent from the other, probate will be granted to one of the substituted executors, it appearing to have been the testator’s intention that the substitution should take place on the death of either of the original executors, whether happening in the testator’s life-time, or afterwards.

THE Reverend Sir John Lighton, late of Donoughmore, in the county of Donegal, died on the 4th of April, 1827; the deceased in and by his last will, dated the 17th of March, 1827, appointed executors in the words following:—

“And of this my will I nominate, constitute, and appoint Sir Samuel Hayes, and the Reverend Stewart Hamilton, executors and trustees; and, in case of the death of either of them, I nominate and appoint Edmund

Hayes, and my brother Henry Lighton, to act and be executors and trustees in their stead."

On the 10th of June, Sir Samuel Hayes proved the will in his Majesty's Court of Prerogative in Ireland, the right of the Reverend Steward Hamilton, his co-executor, being saved. Upon the death of Sir Samuel Hayes, in the life-time of the Reverend Steward Hamilton, probate of the said will, under seal of the Prerogative Court of Ireland, was decreed to Edmund (now become Sir Edmund) Hayes, for completing the administration of the deceased's effects in that country, with a power reserved to Henry Lighton, the other substituted executor. This probate was decreed on the 11th of January, 1828.

The deceased died possessed of a policy of insurance on his own life in the Equitable Assurance Office, in England, of the value of about 6,300*l.*; and for the purpose of obtaining payment of it, the present application was made for a grant of probate, in this country, of the same will, to Sir Edmund Hayes. It was founded on the affidavits of Sir Edmund Hayes, of Mr. Shaw, of Dublin (who prepared the will,) and of Dr. Abraham Colles (the physician who attended the deceased;)—that he, the deceased, at the time of executing his will, was in a very dangerous state of health, and contemplated the near approach of his death; and that it was intended by the deceased that the substitution of executors should take effect in the event of the death of either of the first named executors, at any time.

A proxy also was exhibited under the hand and seal of the Reverend Stewart Hamilton, by which he waived his title to probate, and consented that it should pass to the substituted executors, jointly or severally.

*Jenner*—on these documents, and on reference to a case, (*a*) in which the Court had made a grant similar in some of its circumstances—moved that probate be decreed to Sir Edmund Hayes, Baronet, as one of the substituted executors.

Motion granted.

(*a*) In the goods of Milo Bourke, late of Jamaica, deceased, it appeared, that, by his will, executed a few hours before his death, he appointed his brother, and Mr. Murphy, executors: the will also contained this clause:—

"In case of the death or departure from this island of my said brother, I appoint Joseph Fannin, Merchant, an executor in his stead."

The brother died, having proved in Jamaica. Mr. Murphy renounced in that island, and declined to take probate in England. On an application, by Mr. Fannin (supported by his own affidavit,) for probate in this country in common form, and, upon stating that he was shortly about to return to Jamaica, the Court was satisfied, that his appointment, as a substituted executor, was clearly intended to take effect, either upon Mr. Bourke—the brother—dying, or quitting Jamaica in the life-time of the testator, or subsequent to his death—and granted the probate.—Michaelmas Term, 1st Session, 1826.

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In the Goods of the COUNTESS DA CUNHA.—p. 237.

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(*On Motion.*)

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Administration—limited to the receipt of dividends in the English funds—granted to a minor residuary legatee—the wife of a minor—both subjects of, and residents in, Portugal, on a certificate being produced, that by the law of Portugal she was entitled.

THE sum of 14,911*l.* 16*s.*, three *per cents.* was entered, in the books of the Governor and Company of the Bank of England, in the name of "Her Excellency Donna Maria Gertrudes Quintella, of Lisbon, spinster, now the wife of His Excellency Don Joze Maria Vasques Da Cunha, Count da Cunha." This lady dying, by her will, dated 8th September, 1824, appointed her daughter, Donna Maria da Carmo (a minor,) residuary legatee. The will was established in Portugal, and a Judge Administrator assigned; who, in that character, had the entire management and control of the minor's property. On the marriage of the minor to the Count of Vianna, under the license of the Princess Regent of Portugal, her disabilities, as a minor, ceased, and the appointment of the Judge Administrator was revoked. The husband was also a minor; but it appeared that, by the laws of Portugal, by reason of his holding a commission in the army, and of his marriage, he was considered of full age: and was legally authorized to do all acts the same as if he had attained the age of twenty-one. On this account, therefore, a guardian could not be appointed.

To establish these facts, the following documents were laid before the Court, viz.—the sentence of the Court at Lisbon confirming the Countess da Cunha's will, and the will therein embodied—the appointment of the Judge Administrator—an affidavit as to the existence of the stock in the manner described—and a certificate of four Portuguese Advocates as to the law of that country on this matter. The certificate was as follows:—

(*Translation.*)

WE, the undersigned Advocates in the civil and criminal courts of the capital and city of Lisbon, and in the Supreme Tribunal of the Caza da Supplicacao thereof, do attest that, by the laws and customs of the kingdom of Portugal, it is competent to his Excellency the Count da Vianna, an inhabitant of the said capital, and to her Excellency Donna Maria, his wife, Countess of the same title, to administer the property and effects belonging to them respectively, although neither of them, the said husband and wife, may have yet attained the age of twenty-one years. We do also attest, that pursuant to the same laws, all legal obligations and instruments duly made by the said Count da Vianna are valid in the kingdom of Portugal, notwithstanding he is under twenty-one years of age. We finally attest that, by virtue of the dotal contract, or respective agreement made on the 15th January, 1814, previous to the marriage of the Count da Cunha with Donna Maria Gertrudes Quintella, Countess da Cunha, deceased, the said Countess da Vianna enjoys full right, during her life-time, in conformity to the said laws of Portugal, to administer and receive the interest and dividends on the sum of 14,911*l.* 16*s.* three per cent. consolidated annuities, standing in the books of the Governor and Company of the Bank of England, in the name of, &c. &c.

Done in Lisbon, 15th January, 1828; and signed by Jose Manoel Pinheiro de Castro. Joaquim Lourenco Lopes. Francisco Pinto Coelho de Castro. Manoel Felis de Oliveira Pinheiro.

In explanation of this certificate, it had also been ascertained that, by the law of Portugal, the Countess of Vianna, under the dotal contract, was entitled only to the dividends of the stock during her life.

*Lushington*, upon these documents—now moved for an administra-

tion, with the will of the Countess da Cunha annexed, to be granted to her daughter, limited to the receipt of the dividends.

The Countess of Vianna, being the residuary legatee, is, under the will of her mother—the Countess da Cunha—entitled to the administration: the Courts of Justice in Portugal have put an end to their own authority to administer. Two difficulties, however, arise; the Countess of Vianna is a minor, and a married woman, and her husband is also a minor; and, by our law and practice, a minor cannot take the administration<sup>(a)</sup>, nor appoint an attorney to take it for her—she must appoint a guardian; but as this, it appears, cannot be done by the laws of Portugal, the case resolves itself into this question—will the Court enforce the practice, as it exists in England, or adopt the Portuguese law?

Under the special circumstances, the Court, perhaps, will not think it necessary to enter upon this consideration, but decree this administration to pass, as no possible danger can arise from a grant so limited.

*Per Curiam.*

From the documents, it appears that the Countess da Vianna is entitled to the dividends; and, as no possible inconvenience can arise from this limited grant, the Court allows it to pass.

Motion granted.

(a) Vide Toller's Law of Executors, p. 100, 4th Ed.

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In the Goods of ALEXANDER FERRIER.—p. 241.

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*On Motion.*

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The legatee for life of certain property having assigned over his interest to the substituted legatee, an administration with a will annexed—limited to that interest, granted to the tenant for life—may be revoked, and a new administration—limited to that property—decreed to the substituted legatee, then possessed of the sole entire interest therein.

By indenture dated the 9th of November, 1794, made between John Briggs the elder, and Martha Lysaght widow, the relict of Arthur Lysaght, in contemplation of their marriage, it was agreed, that John Pybus, George Westcot, Alexander Ferrier, and Thomas Lane should, of their settlement, be appointed trustees, and that the said John Briggs should assign over to the said trustees whatever sums might become due to the said Martha Briggs from the third part of the net produce of the estate of her former husband, to be by them laid out in government funds, or lent on good security, or employed in the purchase of land, as the said John Briggs should think proper to direct; and it was further agreed that the said trustees should be accountable to John Briggs for the income or produce of the above sums, or lands, during his life, and afterwards to the said Martha his then intended wife, in case she should survive him; but that, on the decease of both of them, the sums thereby assigned in trust should so remain for the benefit of the child or children of the said intended marriage, and to be divided amongst them, on their coming of age, in such proportions as the last surviving parent might direct in writing, but, in default of such direction, then equally.

The marriage having taken place, an investment was made of the

above-mentioned third part in the public funds. Of the marriage, two children only—John and Stephen—attained their full age, who, with their father, survived Martha Briggs. Mr. Ferrier, the last survivor of the trustees, died in May, 1809, without being possessed of any personal estate, within the province of Canterbury, except this trust-property: his executors therefore refused to prove within the province of Canterbury, and administration (with will and codicils annexed) of his effects, limited so far only as concerned the interest, and dividends then due, or which thereafter might grow due, on the trust stock, during the life of John Briggs—had been granted to him by this Court. A proxy from John Briggs—the administrator—was now exhibited, consenting that this administration should be revoked in order that a grant, limited to this trust stock, might be decreed to his two sons.

On the caveat-day after last Michaelmas Term, *Daubeny* moved the Court to revoke the administration formerly granted to John Briggs the father, and to decree it, limited to the trust property, to the two sons.

*Per Curiam.*

THE COURT said, there was a difficulty in revoking an administration which was effective as to all the purposes for which it was, originally, granted; and also expressed a doubt whether it would be justified in taking such a step, as the father might still retain a power of appointment, in respect of this money, between his children, or might, possibly, have assigned his life interest to a third person. It, therefore, directed the matter to stand over.

On this day *Daubeny* renewed his motion, and brought to the Court's notice the opinion of an eminent Chancery counsel to the effect—that a Court of Equity, had it been applied to during the life-time of the trustee, would have compelled him to transfer the stock to the sons, the father having first assigned over his life interest to them, and released his power of appointment.

*Per Curiam.*

The object of this application is, that the sons should obtain possession of, and control over, the principal during the life-time of the father, these three persons having the only interest in the property; for there is now an affidavit of the elder Mr. Briggs, that he has not assigned over his right to any third person. The Court would be inclined to do all that the trustee, or his representative, could be called upon to do; but there is this awkwardness, that I am asked to revoke an administration good for all the purposes for which it was originally decreed; still I think myself justified, under the circumstances, in directing that, as soon as the father shall have assigned over to the sons his interest under the trust deed, and shall have executed a release of his power of appointment, the former limited administration may be revoked, and that administration limited, as prayed, may pass to the sons.

Motion granted.

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MARTIN and Others v. LAKING and OLDHAM.—p. 244.

The widow having, after the testator's death, caused his will to be destroyed, probate of the draft of such will granted; and the widow condemned in the whole costs of the suit.

ROBERT MARTIN died on the 14th of December, 1826. In Hilary Term, 1827, a Proctor appeared for Elizabeth Martin the lawful widow of the deceased, and alleged her to have been sworn, and to have entered into the usual bond with her sureties, and prayed administration. This was opposed by two of the executors appointed by the deceased to his will, whereof the draft had been propounded, and an allegation given in, stating in substance:—

That the personal property amounted in value to 11,000*l.*, and his real estate to 2,300*l.*; that in 1811, he became the father of a female illegitimate child, who was christened by the name of Martin, and was brought up by the deceased in his own house, and educated at his expense, and was, upon all occasions, acknowledged and treated as if she had been his only child; that in 1814 the deceased having an intention to provide for his illegitimate daughter, executed his will agreeably to a draft which he had previously approved of, and which had been prepared from his own instructions; and that within a fortnight of his death, he declared “that his said daughter would have 10,000*l.* or more;” that, in 1826, he married his housekeeper—Elizabeth Rawlings; and, shortly before his marriage, he gave her 1,000*l.* for her own use, and informed his solicitor, that he proposed, by a codicil, to make her a small addition.

The widow, in her answers, admitted that she directed the above-mentioned will to be destroyed, and that she afterwards said the deceased himself had destroyed it, “because she conceived and imagined that the deceased, by his marriage, did, in effect, revoke and make void his will.”

*Lushington*, for the executors—prayed the Court to pronounce for the will as contained in the draft, and to condemn the widow in the whole of the costs.

*Phillimore, contra*, admitted that the proof established, that the draft was entitled to probate; but trusted the Court would not condemn the widow in costs, as she had clearly acted under a mistaken view of the law.

*Jenner*, for five of the next of kin cited to see proceedings—prayed for their costs out of the estate.

#### JUDGMENT.

SIR JOHN NICHOLL.

This is a case, that does not very often occur—of a will which was in existence at the testator’s death, but afterwards destroyed: fortunately the draft was preserved.

The allegation, which is fully proved, states the education of the deceased’s illegitimate daughter; that she was brought up in his house, and treated and acknowledged as his lawful child; it then pleads the due execution of his will; and there is no doubt that it was, when executed, conformable with the draft now before the Court. In 1826, the deceased married Elizabeth Rawlings, with whom he had previously cohabited for nine or ten years. Before marriage he had conveyed to her a thousand pounds. The will—exclusively in favour of the child—the widow, shortly after the testator’s death, caused to be destroyed, notwithstanding strong remonstrances were made at the time on the impropriety of such a proceeding. By whatever inducement she was tempted to this misconduct, it is clear that the will, having been in existence since the deceased’s death, is valid, and, consequently, that this draft

also is valid. I am, therefore, bound to decree probate thereof, and to go the length of condemning the widow in the full costs.

It is a little fortunate for her, that, at the time she was guilty of this act of spoliation—one of the grossest frauds that can be committed—the statute, which imposes the penalty of transportation for such offences, had not been enacted: since then a provision, in one of Mr. Peel's bills, has been made by the Legislature for the punishment of crimes of this nature<sup>(a)</sup>. The moral guilt of Mrs. Martin is, however, the same; and I feel no hesitation in condemning her in costs, whether they can be obtained or not. The costs of the next of kin may be paid out of the estate.

(a) By 7 and 8 Geo. IV. c. 29. s. 22. it is enacted, "that if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned; [viz. transportation for seven years, fine or imprisonment, or both] and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or instrument, is the property of any person, or that the same is of any value."

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PITT, Assignee of Woodham, v. WOODHAM.—p. 247.

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*Act on Petition.*

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The Court will not—at the instance of the assignee of an insolvent, and on a suggestion that the insolvent had not received his distributive share—call upon the widow and administratrix of the father of the insolvent for an inventory and account, after a long acquiescence of the insolvent and his assignee; and when it is shown that a valuation and inventory of the deceased's effects were made shortly after his death, and facts are proved from which it may fairly be presumed, that the insolvent had received considerably more than his full share. This Court can only require, that all the deceased died possessed of should be included in the inventory; It cannot call for an account of the subsequent profits on his business.

THIS was an application for an inventory and account.

*Addams*—for the widow and administratrix,—cited *Ritchie v. Rees* and *Rees*, 1 Add. 144, and prayed the Court to dismiss his party.

*Lushington*—*contrd*, for the assignee—observed, that in the case cited, the deceased had been dead forty-four years; and though the party was, in that instance, relieved from the obligation of delivering an inventory, the Court was very anxious at that time, and would always be so, to guard against a relaxation of the rule of law in this respect.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for an inventory and account against the widow, and administratrix, of John Woodham. He died intestate, in February, 1803, leaving behind him a widow and four children—two sons, and two daughters—all minors; Mary Anne, being fifteen years of age; Caroline, thirteen; John, eleven; and Thomas, eight. Thomas, consequently, became of age in 1816. In 1820, he took the benefit of the

Insolvent Act, when he swore to his schedule; and, at that time, he did not pretend that he had any claim on his father's estate. Pitt was appointed his assignee; and, in 1827, cited the administratrix to exhibit an inventory and account, suggesting that Thomas Woodham had not been paid his distributive share: this demand is made twenty-four years after the death of the intestate—eleven years after the insolvent was of age—and seven years after his insolvency. Now, to justify the party in making this application, and, still more, to justify the Court in acceding to it, very strong reasons must be adduced; for the presumption, that the intestate's estate has been duly administered, is very strong.

The deceased was an oilman, carrying on business in Queen-street, now Museum-street, Bloomsbury. The widow states, that the whole of the property, at the time of his death, was under the value of 900*l.*; that she took administration under 1000*l.*; that the debts amounted to 193*l.*, and the funeral expenses and mourning, to 75*l.*, leaving a net amount of 630*l.* If this be correct, the widow, being entitled to one-third, and each of the four children to one-sixth, the share of each of the latter would be 105*l.*; and if the value of the property had fully amounted to 1000*l.*, each child would be entitled to 159*l.*; and if the good will of the business had been valued at that time, I cannot think it would have made the distributive shares exceed 160*l.*, for this Court cannot go into any consideration beyond what was the value of the property at the deceased's death: but further—there is nothing to show that the good-will was not included, as I suppose it was, in the estimate of the effects at 900*l.* On the other hand, Mrs. Woodham states, that, to her son Thomas, she advanced 358*l.*; and, of this, about 300*l.* before 1809; so that the sum advanced was much more than the principal, and interest, on his distributive share, calculated at the highest possible amount. Under all the circumstances, at this late period, the Court must, I think, presume that Thomas Woodham received his full distributive share; for it would be exposing parties, in this station of life, to very harrassing demands, if they were called upon for an inventory and account after so long an interval, as they cannot be expected to keep very regular vouchers.

In confirmation, however, of the correctness of her representation as to the effects of the deceased, and of their value, the widow further states, that two persons, in the employ of a friend of the deceased, attended and took an account of the book-debts—of the stock in trade, &c.; and that a regular inventory and appraisements of these, and of the furniture, were made by a sworn appraiser, Abbot, who is since dead; that it was upon this inventory and valuation (which cannot now be found) she ascertained the amount of the effects in order to take administration; and she was thus enabled to swear them under 1,000*l.* This statement is corroborated by Mr. Butterworth—a friend of the deceased, and of his family—who assisted the widow upon the death of her husband—was several times at her house—accompanied her to Doctors' Commons, when she took out administration—and became her surety. He speaks to the making of the inventory and valuation by Abbot, and says, that the widow was wholly guided by it, and that he believes that “every part of the deceased's personal estate was included;” and if “good-will” was to be valued, it must be inferred that it was not omitted.

Here then, under the circumstances, there is a sufficient constat that the personal effects did not amount to 1,000*l.*, as the administration was

taken under that sum; and there is good reason to believe, and presume, that the son, Thomas, received more than his distributive share. In substance, an inventory and account have been given, and that is all that can now be expected or furnished. Where is any thing to falsify all this, or to induce the Court to suspect that there are any *omissa*, or to call for a more particular and detailed inventory and account? The widow, the eldest son, and one daughter, have carried on the intestate's business;—the other daughter went out as a governess: these, by their industry, and frugality, have supported themselves; have added a little to their property; and laid out, in maintaining and educating this very son Thomas, more money than his distributive share; while he has become an insolvent, and can give no better description of himself, at the head of his affidavit, than by the unprofitable addition of gentleman. His claim is only on the property which his father left at his death; for this Court has no authority to search into the profits which the widow and other children have acquired since by their own industry, but only to insist that every thing, of which the intestate died possessed, should be fairly included in the inventory; and I am of opinion that the administratrix has sufficiently shown that all was accounted for, and that the son has admitted the receipt of all to which he was entitled. True it is that there is no formal release, but there is what is tantamount to it—*viz.*, a long acquiescence of himself and his assignee, and no claim asserted at the time of his insolvency, when he swore to the schedule of his effects.

Upon the whole, therefore, I think there is no reason whatever to order any further explanation: on the contrary, I can see no sufficient ground which justified his calling at all on his mother, at this late period—eleven years after he came of age, and seven years after his insolvency—more especially after the affidavit to which she was sworn in April last (a). If he, an insolvent, and his assignee, choose to institute a proceeding which has much the appearance of a desire to harrass, and of a hope, possibly, to extort something from this old woman—and enter into unnecessary details of subsequent circumstances, which have no real bearing on the question, they must do it at their own peril, and at the risk of costs. I feel that I am bound to dismiss the administratrix, and to condemn the assignee in costs.

(a) In this affidavit, Mrs. Woodham—after specifying various sums, amounting altogether to 358*l.* 18*s.* 9*d.*, which she had paid to and for the immediate benefit of her son Thomas, since the death of his father; and that she had, in fact, expended considerably more on his behalf,—stated that, as her agent, he was indebted to her 44*l.*, being a balance due on the sale of two hogsheads of oil.

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In the Goods of AARON HURRILL.—p. 252.

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*On Motion.*

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Extrinsic evidence is necessary to make an unfinished paper operative; nor will a proxy of consent from all entitled in distribution, otherwise, justify the Court in granting probate to such an instrument, unless the affidavits set forth facts which, if proved, in *solemn form* of law, would sustain a disputed paper.

THE deceased, on the 29th of December, 1827, died: he left behind him a widow and six children, the only persons who would be entitled to his personal estate in case of an intestacy:—on the first of January, two of the deceased's sons found, carefully preserved, a paper—all of his own hand-writing—enclosed in an envelope, unsealed, and thus endorsed—"The last will and testament of Mr. Aaron Hurrill, dated 1827. Extrix Mrs. Hurrill." The will purported to dispose of all his real and personal property, in favour of his wife: it was regularly drawn, and thus concluded, "In witness whereof I have to this my last will set my hand and seal this                      day of                      1827"—but it was neither signed, sealed, nor further dated than by the year: there was also a clause of attestation, but it was not attested.

The children executed a proxy of consent that probate might be granted to Mrs. Hurrill. An affidavit was also exhibited as to the paper and envelope being in the hand-writing of the deceased; to the place of finding it; and that he left no other testamentary paper.

*Dodson*, in support of the motion.

*Per Curiam*.

THE COURT, after stating the facts, said:—I cannot, according to established rules, grant probate of this paper in *common form*: it is manifestly unfinished; and, consequently, requires some circumstances to repel the legal presumption—that the deceased had not finally made up his mind thus to dispose of his property. The affidavits merely go to hand-writing and finding; and are consistent with the paper having been written many months before the deceased's death. The proxy of consent from the six children (who, I presume, from having executed it, are all of age) is not sufficient to induce me to break through the rule, that a probate shall not be granted—even with the consent of all persons who would be otherwise entitled—unless the affidavits set forth facts which, if proved in *solemn form* of law, would sustain a disputed instrument. Now that which is here stated would not, if fully established by plea and proof, enable the Court to grant a probate:—the affidavits do not contain facts sufficient to render this a valid document. I feel the less hesitation in arriving at this conclusion, as the children, being all of age, can, if satisfied of the deceased's intention, effect the same object in a different and a more gracious mode—by assigning, and conveying to their mother, when administratrix, all their distributive shares, relying on her, afterwards, to make a proper arrangement: but, in conformity with the rules of this Court, I cannot grant the present motion; and shall, therefore, decree administration to the widow.

Motion refused.

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JONES and JONES v. JONES and JONES.—p. 254.

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*On Motion*.

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After publication—on an affidavit that the depositions had not been seen, and that the matter was *noviter perventa*—exhibits may be pleaded.

In this case two wills of William Jones were propounded, one—dated February 21st, 1822—by James Jones, one of the deceased sons; the

other—dated May 12th, 1823—by two of the daughters: and this was an application by James Jones, to be allowed to give in an allegation, after publication, pleading four letters (two dated shortly before, and two shortly after the execution of the will of May, 1823), written by Mary Jones—one of the adverse parties—and admitting that the deceased, at the date of those letters, was in a childish state. An affidavit, sworn by James Jones, was brought to the above effect, and stating, that he was, for the first time, informed of the existence of the letters on the ninth of February instant: publication having passed on the 24th of January.

*Lushington*, in support of the motion.

*Jenner*, *contra*.

*Per Curiam*.

This is a special application to be allowed to plead further matter in the principal cause, after publication has passed, and the proctors have declared they give in no further allegations unless exceptive. An affidavit has been made that the facts are *noviter perventa*, and that the depositions have not been seen: generally, in applications of this nature, the affidavit is required to state another circumstance as to the nature of the facts, *viz.*, that they are material to the decision of the cause; for then the Court would be able to form some opinion whether the plea might safely go to proof: but as this allegation is merely for the purpose of introducing exhibits,—letters written by the adverse party,—I think I am bound to allow it to be brought in (*a*). The most summary way of making these letters evidence will be the best; they may, possibly, be admitted—even without answers—in acts of Court: at all events—in answers explanatory of their meaning, and of the circumstances under which they were written—unless indeed their authenticity and genuineness be denied, and even then, evidence of hand-writing alone would be gone into.

As to the effect these exhibits may have in the cause—it is unnecessary, at present, to enter into that consideration; if they are not material, they will do no injury; if, of importance, the Court should be informed of their contents:—I, therefore, think them proper to be introduced.

Motion granted.

(*a*) *Instrumenta produci possunt post publicationem testium, etiam usque ad conclusionem exclusivè: quid in his cessat timor subornationis: etiam, post conclusionem, stante justâ causâ Judex potest scripturas admittere.* Maranta, part 6. p. 41. & 47. And Gail says:—*Si post conclusionem reperta sint nova instrumenta, Judex debet conclusionem rescindere.* Gail. lib. 1. obs. 107. Vide also Oughton, tit. 104. (c). and Dornspenger, lib. 1. c. 5. *de instrumentis*.

### BRYDGES v. KING.—p. 256.

The clearest and most consistent evidence of capacity, and volition, are required to support a codicil conveying bequests of such extent as to be irreconcilable with the character of the deceased, and with her intentions as proved by her affections, and former testamentary dispositions; the deceased being, at the time, within ten days of her death, and in a state of extreme weakness and debility; all her confidential friends excluded, or absent, and those only about her who are benefitted under, or engaged in, the preparation or execution of the instrument.

*Jenner and Phillimore, for Sir Harford Jones Brydges.*

*Lushington and Addams, contra.*

JUDGMENT.

SIR JOHN NICHOLL.

An instrument, as a second codicil to the will of Mrs. Mary Brydges, is propounded in this case, by Sarah King, a legatee under it; and is opposed by Sir Harford Jones Brydges, an executor, and the residuary legatee appointed by the will.

The validity of the paper must rest, principally, upon the credit given to the attesting witnesses; for, if they can be fully trusted, it is proved to be the act of a capable testatrix. The depositions are not of a very extraordinary length, but so many of the attending circumstances have been noticed in argument, and the credit of the witnesses so much depends upon an accurate view of the evidence, that it may be necessary, notwithstanding the time it may occupy, and the fatigue it may occasion to the Court individually, to refer to, and read, more of it than the Court is, in ordinary cases, accustomed to do.

The deceased died on the fourth of February, 1826, unmarried—having no nearer relation than a cousin german, or a cousin german once removed: she was, at the time of her death, more than seventy-two years of age—she resided at Hambrook Grove, near Bristol—and had personal property to the amount of between 50,000*l.* and 60,000*l.*—besides real estates of some value: she made, and executed, her will on the nineteenth of March, 1823, by which, after leaving several small legacies, she bequeathed to Sir Harford Jones, on condition that he took the name of Brydges, her Hambrook estate, and also a legacy of 35,000*l.* stock—to Mr. Wotton, her estates in Hertfordshire, and Bedfordshire, and also a house and premises at Ledbury, provided he would not sell them; and she appointed these two persons, together with a Mr. Daniel, her executors; and Sir Harford Jones her residuary legatee. The first codicil to this will, dated on the fifteenth of April 1825, revokes the devises to Wotton, and his appointment as executor, and gives those estates to Sir Harford Jones, with the same condition respecting his change of name as was contained in the will, and confirms his nomination as her executor, and residuary legatee. The disposition by both these papers then, has for its principal object, her cousin, Sir Harford Jones: he is to have her real estates—he is to have her personal property—he is to take her name—and become the representative of her family (a).

In respect to character, this old lady is represented by the pleas, and evidence, to have been penurious—proud of her family—and clever. The disposition of her property by the will accords with this character:

(a) On the 4th Session of Easter Term, 1826, an application was made by counsel to the Court, supported by an affidavit of Sir Harford Jones, that a probate of the will and of the codicil thereto, dated 15th April 1825, be granted to him—reserving the question as to the validity of the paper-writing, dated the 25th of January, 1826. This motion was opposed also by counsel; but the Surrogate (Dr. Arnold) decreed the probate to pass the seal; the sum of 18,000*l.* three per cent. Consolidated Bank Annuities being first invested in the names of trustees, to abide the issue of the cause, subject also to the revocation of the probate, in case the paper-writing, propounded as a further codicil, should be established.

as penurious, she gives only a few trifling legacies—with the exception of one of 2,000*l.* stock to her cousin Mary Wotton, and one of 200*l.* to her executor Mr. Daniel, none of these legacies exceed 100*l.*, and altogether they amount to less than 3,000*l.*:—as proud of her family, she selects her cousin, Sir Harford Jones, of whom it is proved she was fond of talking, and she requires him to continue the family name—as clever, she is herself the writer of the will, which is clearly and accurately expressed (and being embodied in technical language, was probably framed upon some precedent)—very fairly written—very cautiously executed—and is attested by most respectable witnesses—Mr. Wadham, the lord of the manor—Mr. Harford, a gentleman of fortune in the neighbourhood—and Mr. Day, her then medical attendant. The first codicil, by which she revokes the devises to Mr. Wotton and transfers them to Sir Harford Jones, is marked by the same traits, and bears still stronger proofs of care; for she will not trust to herself to prepare it, but she sends for her old confidential solicitor, Mr. Russell, and the witnesses are nearly of the same description as those to the will,—Mr. Wadham, Miss King, and the solicitor, Mr. Russell. These circumstances denote the character of the disposition, and her own character; and to this disposition she adheres for nine months, and till within ten days of her death, though she had been ill for some time, and, for the last two months, had been confined to her bed.

It does, however, appear, that when the first codicil was thus formally prepared, and executed, in April, 1825, the deceased had thoughts of writing a further testamentary paper, in order to leave some benefit to the attesting witness, Miss King; but still, at that time, she had not made up her mind to any definite act of liberality towards either Miss King, or her own servants.

The codicil propounded is dated on the 25th of January, 1826, ten days before the death of the testatrix; and it gives 10,000*l.* to Miss King; 1,500*l.* to her man-servant, Gay; 1,000*l.* to her apothecary, Hay; 100*l.* each to a brother and sister of Miss King, and 30*l.* to each of her servants; and, lest her personalty should not be sufficient to satisfy the legacies, the paper revokes the bequest of 35,000*l.* to Sir Harford Jones, and reduces it to 20,000*l.*(a) This disposition appears to me improba-

(a) This codicil was as follows:—

Whereas I the undersigned Mary Brydges of Hambrook Grove in the parish of Winterbourne in the County of Gloucester Spinster have in and by my last Will and Testament bearing date the nineteenth day of March one thousand eight hundred and twenty three, given and bequeathed unto my Relation Sir Harford Jones of Boultribrook in the County of Radnor, Baronet, the sum of five and thirty thousand Pounds Stock, and also made the said Sir Harford Jones residuary Legatee of my said will—Now therefore, I the said Mary Brydges do hereby revoke and declare to be null and void, the said bequest of thirty five thousand pounds to the said Sir Harford Jones, and instead thereof I hereby give and bequeath unto the said Sir Harford Jones the sum of Twenty thousand pounds—And I hereby Give and Bequeath unto my sincere and worthy friend—Miss Sarah King the sum of Ten Thousand Pound to be paid to her, her Executors, Administrators or Assigns within twelve months after my decease, as and for her and their own monies for ever. And I do also hereby give and bequeath unto the said Sarah King my Gold Watch and Chain, and my little Dog, Fidele, as a testimony of my gratitude for her very kind and unremitted attention to me during my long illness—I do also hereby Give and Bequeath unto Mr. John King the sum of One hundred pounds, and my Bay Gelding “Gay”—and I also give and bequeath unto Miss Eliza King the sum of One hundred Pounds. I also

ble, and alarming—more especially when connected with all the history and facts. Looking at the character of the former papers—the smallness of the legacies—the design that Sir Harford Jones should be the representative of the Brydges family—I think her conduct in taking away this large amount, even for any objects, is not very probable, nor consistent; but when the objects of her bounty are considered—Miss King, an humble companion of two years and a half standing—Gay, a servant of all work—and Hay, one of her medical attendants for not quite two years—it becomes more extraordinary, and creates suspicion, as much exceeding the most liberal reward that could be expected, for their services, in their several stations.

It was contended that the circumstances render the disposition not improbable; that Miss King was her companion, was particularly kind and attentive to the deceased during her illness; that the deceased was sensible of it and very fond of her; that it was understood the deceased had an intention, when she executed her codicil in April—and that it was admitted to have been her duty, to take care of, and provide for her; but to my judgment, this does not render probable a legacy of 10,000*l.*, nor does it much lessen the suspicion, nor the demand for satisfactory proof.

Again, it is said that Gay, though a servant of all work, yet was accustomed to lift the deceased in and out of her carriage, and to assist in moving her in bed; and, by the exertion, met with an accident—a rupture: it is not quite clearly proved, that the original injury was so occasioned, nor that it was sustained in the service of, nor was known to, the deceased; but, if it were, the hurt must have been trifling, for he continued to perform the same offices till her death, and, after her death, he became a volunteer in a troop of yeomanry. The rupture, then, must have been of the slightest kind, and 1,500*l.* is rather an exorbitant compensation on the part of this testatrix.

Hay, whom she had consulted not quite two years, was the village apothecary—residing at hand,—her most frequent, but not her principal, medical attendant—not the one in whom she reposed the most confidence: Mr. Baker, a surgeon of Bristol, was the superior; but, living at a distance, he could not visit her frequently, and the expense would have ill accorded with the deceased's penurious habits; to Mr. Hay, however, this paper gives a legacy of 1,000*l.*: the magnitude of this be-

hereby Give and Bequeath unto Mr. John Hay of Whites Hill in the parish of Winterbourne, Surgeon, the sum of One Thousand Pounds, as an acknowledgment of the very great care, and anxiety he manifested for my recovery—I do also hereby give and bequeath unto my man servant Thomas Gay the sum of Fifteen Hundred Pounds, and also my grey mare “Mary Fox” and my broad wheel Cart, for his long & faithful services to me—To each and every of my other Servants, I hereby give and bequeath the sum of Thirty Pounds, and I do in all other respects confirm my said will (except so far as the same is altered by a former Codicil thereto) and direct this to be taken as a Codicil to my said last Will, and in part thereof, In witness whereof I have hereunto set my hand and seal this twenty fifth day of January in the year of our Lord one thousand eight hundred and twenty six—

M. BRYDGES

*Note.*—The clause of attestation was much in the usual form.

L. S.  
MARY CUNNINGHAM Bristol  
THO. WITCHELL Winterborne  
JAMES KING Bristol

nefit, again, is improbable and suspicious. Besides these bequests, here are legacies to Miss King's brother, John,—to her sister,—and to all the servants; who, of course, by this bounty, would be conciliated and silenced.

When then, in addition to the magnitude of these legacies, it appears that, with the exception of those called in as instruments of preparing and attesting the act, these were the persons, and the only persons, who were around the sick bed of the deceased, and when she was now within ten days of her dissolution, the case becomes so alarming, that, if the Court intends to exert a proper vigilance in the investigation, evidence of volition and capacity—incontestible and uncontrovertible as to its truth and effect—must be required. If a fraud were concerted, and the party principally benefitted, intended to help herself thus liberally, it was expedient to quiet the man-servant, and the apothecary, by allowing them largely to participate; and to conciliate, by smaller portions, the other members of the family who had access to the deceased.

The instrument having been made so shortly before the deceased's death, the Court is called upon to enquire what was her condition, at that time. Her age was pretty advanced; above seventy-two: she had been ill some months, had been confined to her room for three months, and to her bed, for two months—her complaint was visceral, and, therefore, likely to produce gradual dissolution—from lying in bed she became excoriated, and ulcerated, (as it is described) from shoulder to hip, so that it was necessary to cover the parts with plaster—the discharge still further weakened her—she was become so extremely feeble that, although, from the visceral complaint, evacuations could only be procured by artificial means, she was in a state no longer to bear the operation, and the woman, employed to administer the remedy, was dismissed.

When the capacity is put in issue, on the responsive allegation two witnesses, *viz.* this woman, Green, and Carpenter, are produced to support the attesting witnesses. Green says:—

“She began attending about a month before Christmas—she attended a dozen times at least—three, or four, times a week, but she cannot take upon herself to fix the time of her last attendance.”

If she began a month before Christmas, and attended three or four times a week, she would have completed her dozen attendances by the end of December, and there is nothing that enables her to fix the time late in January, though she loosely talks of continuing her duties till a little more than a week before the death of Mrs. Brydges. Hay's bill charges, from the first of January, visits every day; and, from the sixteenth, dressings, and plasters, and visits two or three times a day, till her death: Baker too attends in January, every other day from the eleventh to the twenty-first of that month—yet Green never sees Baker there; and Hay she only knows to be there twice by hearing his voice. The inference is, that she was dismissed long prior to the time she supposes. To the eleventh interrogatory she answers:—“She has no knowledge whatever of a person of the name of Mary Cunningham:” and Cunningham was staying in the house from the 22d to the 26th of January.

Her evidence is more consistent in another particular, with her having ceased to attend the testatrix at a much earlier period: for she says, on the thirteenth interrogatory, “The deceased was, in all respects, as

sensible at the last as she was at the first of respondent's attendance on her: she did not perceive any difference."

Considering that Mrs. Brydges was rapidly sinking at the date of the codicil, either this witness must have quitted the house sooner than she now fancies, or else no great reliance can be placed on her testimony.

On the fourteenth of January, Miss King wrote to Sir Harford Jones, giving an account of the deceased's state: that letter has been annexed to the sixth interrogatory, and contains the following passages:—

"Knowing it to be your particular wish to be kept advised of the state of your dear cousin's health, is the reason of this so soon following my last respects, which I hope meets your approbation. Since I last had this pleasure, I regret to say Mrs. Brydges has continued to grow worse, and my candid opinion is that she is gradually declining, though Mr. Baker, when he saw her yesterday, said he could not see any immediate danger; he has promised to come again in a day or two, when I will write you again, should occasion require it."

According, then, to the result of the evidence of Green, and of this letter, the deceased, towards the middle of January, is gradually sinking, dissolution is approaching; Baker's visits are frequent, but the danger is not immediate.

Carpenter is made to state that, on the twenty-fifth of January, he was called into the deceased's room; that he was told by the deceased herself to fetch James King, to take the old mare; and, from his description, Mrs. Brydges would appear to have been quite alert.

This is not a fact pleaded, and it is the only time that Carpenter, an out-door workman, is suggested to have seen her; he has been discharged since the death of Mrs. Brydges, and before his production as a witness: it will be for the consideration of the Court, therefore, whether this story is probable, and how far consistent with Cunningham—whether he is to be credited, or whether this is an after-thought to bolster up the case, and the testimony of the subscribing witnesses. These, however, are the only two persons in support of the general capacity.

On the other hand, the facts lead strongly to a contrary deduction. At this advanced age, after this long illness—having been confined to her bed two months, being in extreme bodily debility, ending in gradual dissolution—the deceased must, so shortly before her death, have been labouring under considerable mental infirmity. There are some other facts also inducing the same conclusion: she had a job of work going on in her house—an addition making to it by contract: she liked to enquire how the building was advancing, she was impatient to get it finished; yet the workmen were often stopped; and Witchell, the mason, the principal contractor, who slept in the house, was never called into her room for the purpose of direction or enquiry, after November, till he is summoned, at eleven o'clock at night, as a witness to the execution of this codicil. These workmen wanted money very much on account of their job, especially at Christmas time, yet they could get none: the promise was that they should have some as soon as the deceased was well enough to sign a cheque. Brown, their own witness, says on the fifteenth interrogatory:—

"That besides the work he performed under Witchell's contract, he, at the same time, had other jobs in hand for the deceased, the payment of which he looked immediately to her for. In respect of his own private demand against the deceased, he several times, in the latter end of

the year 1825, applied to Thomas Gay, and also to James King, to get his bill paid: and, in respect of the contract work, he very often about the same time applied to Thomas Witchell. Thomas Gay and Sarah King both said, that as soon as Mrs. Brydges was well enough to sign a draft on the banker, the money should be paid; and Witchell said, that they had told him the same thing: respondent was very much distressed for want of money."

There are some other material facts illustrative of the state of the deceased. In the latter end of December Sir Harford Jones, who was then staying at Bristol, went over to Hambrook Lodge to visit the deceased, but did not get a sight of her; and Miss King, in her answers, admits the fact, stating:—

"That she went up stairs twice to the deceased in her chamber, and informed her that Sir Harford Jones was there, and, upon both occasions, she brought down an answer, as the fact was, that the deceased declined seeing him, saying, she was very poorly and unable to bear talking."

Looking, then, upon this to be true, here—at the end of December, the deceased is so poorly, and so little able to bear talking, that she cannot see the person to whom, above all others, she was most attached,—whom she was, probably, most desirous to see—who was the principal object of her bounty, who was to take her name, and become the representative of her family. The fact is undisputed, that he did not see her.

Another circumstance respects Mr. Russell, her solicitor, her man of business—to whom she was constantly applying as long as she was able: up to August she used to go over to Bristol two or three times a week, to speak to him—he is since dead, but his nephew, who kept his attendance-book, proves, that, in November, his uncle was very anxious to see the deceased, that he went over to Hambrook, and, on his return, said, "that Miss King would not allow him to see the deceased." This fact is admitted in her answers to the eighth article:—

"The respondent admits, that the articulate John Russell did, after the commencement of the aforesaid illness of the testatrix, call at her house at Hambrook on several occasions, as she believes, and make enquiries after her health; and he may have made other applications requesting to know when he might see her, and that he was told by the respondent, and otherwise with her knowledge, on reference first had to the testatrix herself, that she, the testatrix, was not in a state, meaning of bodily health, to see any person on ordinary business, such as that usually transacted between persons in the relation to each other of the deceased and the said John Russell, or to attend to any such business."

Now that is the best way Miss King can soften down this occurrence in her answers; and it is certain that Russell, though he frequently went to Hambrook Lodge, never got access to the deceased, after she was confined to her bed; and the day after the execution of the codicil Miss King sent a message to Russell, "that Mrs. Brydges was much in the same state, and could not be seen."

These facts infer that the deceased was either so ill and weak, as to be unfit for the transaction of ordinary business, or to see her dearest friends; or else there was a fraudulent exclusion of those in whom she had confidence—Sir Harford Jones, and Mr. Russell, her solicitor: if her state were such as justified their exclusion, she must have been quite

unequal to business; otherwise, an interview could only have been denied, in order to effect some clandestine purpose.

What, then, is the evidence (and a most important piece of evidence it is) of the only respectable witness—whose visits could not be refused—of Baker, her superior medical attendant; he is the single witness, having access to the deceased, that is left to Sir Harford Jones, for all others were either shut out, or disqualified by the legacies given them: he is disinterested, and there is no reason to doubt his impartiality; and from his profession, he is able to form a sound opinion: he states on the fifth article:—

“That he attended the deceased of the illness whereof she died, commencing his visits on the 26th day of October, 1825, and visiting her eight times between that day and the end of the following month of November. During the month of December, he visited the deceased about once a week; deponent visited her on the 4th of January, 1826, and from the 11th day of the same month, he visited the deceased every other day until the 21st, when, having occasion to leave home, he did not see her again until the 31st of January, after which he visited her daily until her death. When the deponent commenced his said attendance (on the 26th of October), he found the deceased labouring under visceral disease, to which she had been formerly subject: the complaint now attacked her with increased force, and had a very evident effect upon her bodily strength, and also on the faculties of her mind; both of which, from the commencement of the said attack, began to decline. The deponent only saw the deceased out of bed once (and that in the month of November,) during her last illness: and from the reports made to him, and his own knowledge of her debility, he does not believe she ever, after that time, left her bed. From the first of deponent’s said attendance (in October) the deceased was more or less lethargic; but, towards the end of December, her lethargy had very much increased; so much so, that he almost always, in his after visits to the deceased, found her dozing, and in a state of stupor, out of which he found a difficulty to rouse her. From the month of October even the deceased’s lethargy was such, that the deponent did not attempt to enter into conversation with her, as on former occasions he had been accustomed to do, but confined himself to the mere questions which related to her complaint: to these questions, and particularly after the month of December, the deponent had great difficulty in obtaining an answer from the deceased; and when she did give an answer, she was frequently corrected by Miss King, her attendant; for instance, as to the number of her evacuations, which the deceased frequently forgot: she also forgot how time passed; this did not much surprize deponent, lying, as the deceased constantly did, in bed, with the window shutters closed, or curtains down: the day-light was excluded: on this account, as he believes, candles were sometimes lighted in her bed-room in the day-time. In the course of the month of December, the deceased complained there was a man behind her who was pinching her back:”—[her sufferings in her back are admitted and described by other witnesses]—“deponent tried to talk her out of this idea; but to no purpose: she declared that she had seen the man: on several subsequent occasions she repeated the same thing. The deceased, on account of long confinement to her bed, contracted an ulceration of the back, which discharged violently, and was one of the causes of her death. Deponent is decidedly of opinion,

and believes, that the deceased was quite unable to attend to business after the month of December, 1825: he cannot depose that she was incapable of the least degree of mental application; he does not believe that she was capable of transacting business of a serious nature, or which required mental application, at any time, after the month of October, 1825. He considers that the deceased, if she had been roused, might have been capable of giving an order as relating to her household affairs, until a late period of her life, but not capable of business that required an exertion of the mind. He found it impossible to keep the deceased's mind fixed to a point, when he had roused her; for, as soon as she had answered one question, she relapsed into her lethargy, and, to pursue his enquiries, it was necessary again to excite her."

This seems a very fair representation, and this evidence, from an impartial, disinterested, witness—competent to form a correct judgment—and supported by the reasonable probability arising from facts—such as her long illness, her extreme debility, and the dissolution which so soon ensued—leaves the condition of the deceased, as to capacity, in a state extremely doubtful; and it agrees with Miss King's admitted conduct as to Sir Harford Jones and Mr. Russell not seeing the deceased: it certainly is not so conclusive but that unsuspected witnesses—telling a consistent story—might show that rousing, aided by self-exertion, would render her equal to a slight testamentary act; but, coupled with the character of the deceased—the nature and magnitude of the disposition—the persons in whose behalf that disposition is made—it requires that the credit of the attesting witnesses should stand unimpeached, and above all exception.

I cannot but agree with the counsel, that if the story to which those witnesses—at least two of them—depose, is fully believed, the codicil is valid: the case, however, as stated at the outset, depends upon their credit.

The three witnesses are—James King, the brother of the party—Mary Cunningham, her intimate friend—and Witchell, a mason who slept in the house. The credit of the two first, and the effect of the circumstances spoken to by the last; are the material inquiries; and I will first consider Witchell's narrative; in point of character he stands unimpeached, but he was present at so small a part of the transaction, that his facts are of little weight: his evidence is of the following tenor:—

"During the two last years of the deceased's life, he had been constantly employed by her in and about her residence; and by reason thereof he slept in the deceased's house. At about eleven o'clock of the night of the 25th of January, 1826, deponent, being in bed at the deceased's house, was called up by her servant, Thomas Gay, who told him that Mrs. Brydges desired he would come up into her room to witness a codicil to her will: deponent is certain that it so happened on the 25th of January, because on the next day, the 26th, he received from Miss King, who lived with deceased as her companion, 250*l.* in part payment of his contract:"—[This has the appearance of a conciliatory act, as Witchell was much in want of money:]—deponent dressed himself as quickly as he could, and went up into the deceased's bed-room; besides the deceased, who was in bed 'pillowed up,' he found there his fellow-witnesses, James King, Mary King, and also Miss King, and Thomas Gay. Deponent, on so entering the bed-room, went round to the bed-side, where James King was standing, and Mary Cunningham

near him. James King, holding a book with a paper on it before the deceased, asked her 'whether what he had written was to her liking.' The deceased answered, 'perfectly so,' or 'quite so.' James King then handed a pen to the deceased, and she wrote her name at the foot of the paper held before her as aforesaid. Having signed it, deceased said to Miss King, 'that will do.' When this was done, James King took the paper to a table near the bed-side, and handed the pen to Mary Cunningham, who signed her name, as did also deponent, (the pen being in like manner handed to him by James King,) as witnesses; and, after them, James King himself. And after the said paper had been so witnessed, James King read over the clause of attestation to deponent. At this time the deceased asked Miss King, whether it was not time for her to take her medicine; and deponent left the room, and went to bed again. At the time that James King read the clause of attestation to deponent, he also told him that the paper so witnessed was a codicil to the deceased's will, whereby his (King's) sister was left ten thousand pounds."

This witness is then called upon to depose as to capacity; and, after identifying the codicil, says:—

"Mary Brydges, the deceased, was, at the time of her approving of and signing her name to the said paper-writing, or codicil, and during the whole time of deponent being present on the evening or night of the 25th day of January, of sound, perfect, and disposing mind, memory, and understanding, and talked and discoursed (what little deponent heard her say on such occasion) rationally and sensibly."

On the 6th interrogatory he answers—"that the deceased kept her room from about September, 1825, until her death; and she generally kept her bed during that period. Respondent was only once in deceased's bed-room between the November preceding and the time of her death, save the time of the execution of the codicil aforesaid. On such single occasion, and also when the codicil was executed, deceased was in bed: he never saw her between November and her death out of her room; or at any other time than the two occasions deposed of. The respondent never saw the deceased in a state of stupor. On the first of said two occasions of his seeing deceased in her bed, which happened, as he believes and best recollects, in the November preceding her death, the deceased sent for him, and gave him directions for raising a wall. On the latter occasion she executed the codicil. At the time she executed the codicil her head hung heavily; but she acted, as it appeared to respondent, entirely of her own accord, without being roused thereto, or showing unwillingness, or irritation."

And on the 7th interrogatory—"he cannot recollect that he saw the deceased on any other than the two occasions deposed of between the end of October, 1825, and her death, and he believes that he did not: on both such occasions the deceased's mental faculties did not appear to him to be, and he believes the same not to have been, weakened, nor her memory impaired. Respondent forming his belief on what passed between himself and the deceased, and on what was done by her, on the two occasions deposed of, swears to his positive belief, that the deceased was, at such times, in a condition to attend to the business which was then spoken about and transacted; and he knows not, and never heard, and has no reason to believe, that the faculties of the deceased ever failed her, so as to unfit her for business."

The whole of this account given by Witchell, and the facts, prove no-

thing that can, I think, be deemed at all sufficient: what passed might as well apply to a draft, as a codicil: all he hears the deceased say respecting the paper is—"quite so," and "that will do,"—all he sees her do is writing a paper on a book; but it seems to me by no means clear that he could see whether there was any signing at all of the codicil, or of any other paper—it is not impossible that an imposition and contrivance were practised on this drowsy person just called from his bed. How are the parties placed, according to James King's own account, on the seventeenth interrogatory? Sarah King is standing close to the deceased, one hand behind the pillow, the other holding the candle—James King is next to her, fronting the deceased, holding the book deskwise, (that is sloping up) of course leaning over the bed—Cunningham next to him fronting the deceased—Witchell next to her also fronting the deceased; so that there were four persons standing by the side of the bed, and Witchell was the furthest from the deceased, and must have been near the bottom: it is hardly possible that he could see the actual writing—scarcely the paper—so as to distinguish what it was, whether a codicil, or a draft, or whether any thing was, in fact, written—still less whether the name was previously written, and a mere dry pen put into the deceased's hand. Whether there is room for the Court to suspect any such deception must be decided on a view of the case in all its bearings; but, in a clandestine transaction at midnight, where parties are helping themselves, they are exposed to all suspicions: I only say it is not impossible that no signature was then made—they must remove all doubts: the effect of Witchell's testimony—giving him full credit for honest intentions—goes but a short way towards proving capacity; he was suddenly called up, and was only in the room about five minutes: he speaks to no act of reading over—to no act of sealing—to no desire that any person should attest—to no words of publication—"she said little—her head hung heavily."

It comes, then, to the evidence of the brother, and of the female friend of the person principally benefitted; and, under all the circumstances already adverted to, it would be hardly safe to trust to the statement of such biassed witnesses. It is said that it was not improbable the deceased might wish to employ the brother of Miss King to draw up this codicil; and—perhaps it would not have been—if the alteration had been slight; but if she intended to make an alteration to such an extent—to revoke, so materially, the bequests to Sir Harford Jones—it would have been more consistent with the shrewd and cautious character of the deceased to have had professional assistance—either her own confidential solicitor—Mr. Russell—or, at least, some other attorney. On the other hand, if a fraudulent imposition were intended, professional aid would be carefully excluded: Miss King and these parties would only trust her brother, and her friend, to prove the important facts: nor would they venture to have respectable neighbours, nor disinterested persons to attest—they would not place the transaction in the middle of the day—they would choose the hour approaching to midnight, and would call the mason out of bed merely to be present at the signature and nothing more: the persons engaged, and the time chosen, are at least as consistent with fraud, as with fairness; and the whole has a most suspicious appearance.

Another circumstance, with respect to time, strikes me as pointing to fraud; the preparation, and execution, took place during the absence of

Baker—he had attended the deceased from the 26th of October, 1825, eight times by the end of November—about once a week in December—on the 4th of January;—but, from the 11th to the 21st of January, his visits had been on every second day; and it is to his opinion, and not to Hay's, that Miss King refers in writing to Sir Harford Jones, on the 14th of January, in the letter already mentioned. On the 21st of January, Baker had occasion to leave home, and did not return till the 31st: this ten days' absence, during which his visits on alternate days were discontinued, could hardly have been unknown to these parties—the time was opportunely selected for obtaining this codicil—the deed was done during the absence of this medical attendant—the only disinterested person who had access to the deceased.

The time chosen then, added to the other circumstances, tends considerably to increase the suspicion, and to excite the doubts and jealousy of the Court: nor is that suspicion much diminished by that which has been much relied on, viz. Hay's telling Baker on his return—"that Mrs. Brydges had repeatedly inquired for him—that she was desirous of their joint opinion, whether she could recover—that he had given his opinion she could not:" and Miss King's declaration, "that the deceased had become quite resigned; and, repeatedly, regretted the respondent's absence."

In the first place, this is at variance with the deceased's unwillingness to see Baker; but, in the next place, the assertions of Hay, and Miss King, are no proof that such an inquiry was ever made by the deceased. Hay was aware of the codicil before the deceased's death, and it is not likely that his 1,000*l.* legacy was concealed from him; whether he was or was not actually a party to the making the codicil—whether he represented the inquiry to have been made by the deceased herself directly to him, or through Miss King, does not appear: the latter is consistent with the evidence of Baker on the 18th interrogatory:—

"When the respondent resumed his attendance on the deceased on the 31st of January, Mr. Hay told him, as Miss King did also, that the deceased had repeatedly inquired for him in his absence; and that she was desirous of having respondent's and Mr. Hay's opinion as to the probability of her recovery. Mr. Hay said, that he had given it as his opinion that she could not recover; and Miss King said, that the deceased had, since that communication, become resigned. He does not recollect that it was said that the deceased was much affected at the report of her danger. Miss King said, that deceased had repeatedly regretted respondent's absence."

If a fraud had been effected—Miss King—aware that a codicil was to make its appearance—would be anxious to pave the way for it, and to suggest circumstances that should render it more probable, and be a sort of announcement of the act—such as representations of the deceased's resignation: while, on the other hand, if all had been fair, and the deceased quite capable, why did they not disclose to Baker that a codicil had been made, even though they did not mention the contents?—why did they not take the first moment, on the 31st of January, to desire Baker to see the deceased—to satisfy himself that she was capable—and, if possible, to rouse her, and to remind her of the transaction, and get a recognition that she had done some testamentary act?—but they never said a word on the subject till two days before her death, and I therefore do think, that those declarations to Baker might be nothing more than

a mere colourable preparation for the production of the codicil—they are not inconsistent with the incapacity of the deceased, and the fraudulent procuring of this codicil—they tend but little to remove suspicions.

I approach, then, the other two attesting witnesses, the chief of whom—the writer of the codicil—is James King—the brother of the principal legatee—a young man twenty-six years of age—an accountant, or clerk to a merchant at Bristol—his salary is 70*l.* a year, and he has perquisites that make it amount to 100*l.*: owing to some family misfortunes, about ten years ago, he went into service for a year and a half, he then became a clerk in a counting-house for several years, and, subsequently, after having been at home for some time, he has been for four years in his present employment. There is nothing in this to the discredit—it is rather to the credit of his steadiness and abilities: that his abilities are not inconsiderable may be collected—not only from his success in life—but also from his deposition: he is not stupid, nor ignorant, so as to be incapable of conducting such a transaction—whether the transaction was fair, or whether it was a contrived fraud and conspiracy: but it is one thing to be equal to trump up a plausible story; and another—and far more difficult—to make it probable, and consistent in all its branches, more especially where it is necessary to have colleagues, who are to fit in the different parts to each other, and yet to avoid the appearance of confederacy: they may preconcert some of the main features, but, if the story be not true, detection will unexpectedly peep out in some collateral or incidental points, which had not been sufficiently arranged.

By these tests I propose to examine the evidence, and shall begin with the account given by James King, and then proceed to that given by Mary Cunningham. The Court will see what improbabilities, what contradictions, what circumstances of suspicion there are, and whether, on the whole, it can venture to repose full confidence in their testimony. I may first observe that King is not merely a brother giving evidence for a sister, but he is the manager of the suit—he applied to every witness—and was active in procuring their attendance—it is his own act,—his own cause—if Miss King fails, it is difficult to say that he may not be responsible for the expenses; but, at least, his credit must be strictly examined: he states:—

“That having been sent for in the middle of the day of the twenty-fourth of January, he arrived at Hambrook Lodge about seven o’clock in the evening; he took some refreshment, and was then fetched into the deceased’s bed-room: his sister, Gay, and the maid-servant, were in the room, but the latter soon left it.”

He goes on making the deceased in the most perfect mind, not only full of intelligence but of activity and alacrity:—

“The deceased, on perceiving deponent, who went up to the bedside, said to him, ‘Mr. King, I have been waiting for you; I am glad you are come, for I have a great deal upon my mind which I must do before my death: you know what I have often promised to your sister, and I cannot think of leaving her to the mercy of Sir Harford Jones after my death: I have sent for you for the purpose of penning down what I wish to do for your sister, Thomas Gay, and those friends who have been so kind and attentive to me during my illness: I am sensible I cannot recover, and my Doctor, Mr. Hay, has told me that I cannot

possibly live many days; I therefore, wish you to sit down, and write what I shall tell you.' "

Now all this is very good, if it be true; but it makes the deceased of a very perfect and alert understanding at this time.

"Deponent, in reply, told the deceased that he was incompetent to perform what she required of him, as he had never done such a thing as to make a will, and he was quite ignorant of the form of words which were (as he believed) necessary to be used in drawing up such an instrument; that if it was her intention to alter, or add to, her will, she had better send for Mr. Russell (meaning deceased's attorney) as a proper person for the purpose."

This, again, is very fair, if it is but true.

"The deceased said, in answer, that she had a reason for not sending for Mr. Russell; it was because she did not choose all the world to know before her death, what her intentions were."

She had, however, trusted Mr. Russell to make a codicil for her in April.

"Deponent rejoined, saying, 'he thought it would be illegal for him to do it (meaning to make deceased's will or codicil): she replied, 'not so, you are fully competent to write any thing I may tell you, and were I to call in a stranger passing in the street to write it, it would be as legal as if done by Mr. Russell.' Deponent then consented, and sat down at a table close to deceased's bed-side, upon which the deceased directed Sarah King (who with Thomas Gay had been present during the aforesaid conversation) to fetch pen, ink, and paper. As soon as the deponent was furnished with the materials for writing, and ready to begin, the deceased sitting up in bed supported by pillows, without further preface, began to dictate, and dictated, 'I, Mary Brydges, of Hambrook Grove, in the County of Gloucester, spinster, do, in addition to my will'—which the deponent committed to writing."

He was quite ignorant of the law, but he follows her dictation.

"Either at this period, or before the deponent began to write (he cannot now be certain which), the deceased gave Sarah King, his sister, her keys, and desired her to go and fetch the 'codicil, made by Mr. Russell, for your brother's government.' Sarah King accordingly left the room, and, in about five minutes, returned with the codicil, now marked B, dated on the 15th of April 1825: when Sarah King brought in the said codicil, she handed it to the deceased, who thereon desired that it might be given to deponent; this done, the deceased proceeded, saying, 'I must begin with your sister,' and she then dictated the words—'I give and bequeath to my sincere friend, Sarah King, the sum of ten thousand pounds,' which the deponent committed to writing; and, referring to the codicil B, added therefrom the words, 'to be paid to her, her heirs, executors, and administrators;' the deceased went on—'and also my gold watch, and chain, and my little dog,' which deponent also wrote down, as he likewise did the further words dictated by the deceased in respect of such legacy to her sister, namely, 'for her long and kind attention,' or to such effect. The deceased then dictated a legacy of one hundred pounds to Eliza King, and to John King one hundred pounds, and her bay colt, which deponent reduced into writing. She next dictated a legacy of one thousand pounds to John Hay, calling him, in addition, 'her medical attendant, for his kindness and unremitting attention,' or words to that effect, which deponent wrote down;

and deceased, adverting to a circumstance wherein Mr. Hay had assisted her with a loan of money, asked deponent, 'whether he recollected it, and further said, how attentive Mr. Hay had been in his visits.' The deceased next dictated a legacy of fifteen hundred pounds to Thomas Gay, calling him 'her faithful servant;' which legacy deponent also reduced into writing, as he did the further bequest to him of a grey carriage-mare; and a cart: after this the deceased went on to speak in terms of commendation of Thomas Gay,—'that she made such bequest in consequence of his long services, and the accident he had met with' (which deponent believes to be a rupture). Deceased then said, that she must consider her other servants, and directed him to set them down for thirty pounds a-piece, which he did. The deceased next said, 'that she wished to name him, the deponent;' on which he observed, 'that he could not be a legal witness to the codicil if she did so.'—He was, therefore, learned in law in that respect.

"The deceased replied, 'she was sorry for it;' and observed that *that* (meaning what she had dictated) was all she had to say. The deponent then said, that he would read to the deceased what, from her dictation, he had written; and did, audibly and distinctly, read the same all over to her in the presence of his said sister, and Thomas Gay, who had been present during the dictation aforesaid, or nearly the whole time thereof, one or the other occasionally leaving the room, but for short intervals only. The deceased, during the reading, from time to time said, 'very good,' and nodded her head, and smiled, and generally by such her expressions and manner, approved of the contents of the paper: having ended the reading, the deceased desired him to make a fair copy of the paper, and added, 'we must have it properly attested;' and said, 'that she wished the deponent—Thomas Witchell—and Mary Cunningham (who were both in the house) to witness it.' The deponent then immediately proceeded to make and made a fair copy of the draft so approved of, and having completed it, he read it over to the deceased aloud, and then, at her desire, handed it to her: the deceased, sitting up in bed, read it to herself, and in so doing observed, 'that she doubted whether she had sufficient money unappropriated to pay the legacies she had thereby bequeathed, and then directed deponent to write down, that the legacies she had given by the said paper were to be paid out of the legacy of thirty or thirty-five thousand pounds (he forgets which) bequeathed by her will to Sir Harford Jones.' The deponent accordingly added, at the foot of the draft, a clause to the effect dictated by the deceased, and having done so, he read over to her the said additional clause in an audible and distinct manner, and she approved thereof in general terms, adding, 'that it was too late, and she was too much fatigued, for a fair copy to be made that night.' The deceased also desired the deponent 'to destroy the fair copy made as aforesaid (which he did by putting it into the fire in deceased's bed-room), and to take the said draft away with him, and bring it fairly copied to her the next day;' and then told Sarah King to carry 'Mr. Russell's codicil' back to where she took it from. The deponent then, having first drawn, at the deceased's desire, a cheque upon her banker for the sum of three hundred and twenty-five pounds, in favour of his sister Sarah King, to pay the various sums due to the deceased's tradesmen, took his leave." Here is also inserted on the margin of this deposition the following passage:—"Having first, on a sepa-

rate paper, copied from the codicil, marked B, the form of words to be used as revocatory of Sir Harford Jones's legacy, which form the deponent, with a slight variation, adopted in making the copy to be deposed of." That explanation was rather necessary, because the revocatory clauses in the two instruments are expressed in the same words.

Now, in this representation, for this is the account of what passed on the night when the instructions were taken, there is as alert a testatrix as fancy can suppose: she enters into long conversations, and explanations, and dictates every part of the paper. James King was so ignorant of forms, that he was unwilling at first to draw up the instrument, and as Miss King, in her affidavit of scripts before the commencement of the cause, swore that the deceased had dictated it, James King is anxious, in every part of his deposition, to show that the whole proceeded from her: she was not only mentally, but bodily, alert;—she is alive to every thing that is going forward—she not only sends for her former codicil, but she hands the keys—the former codicil is delivered to her—so that she must have had the free use of her hands and arms—she not only, from time to time during the reading, says "very good," but, in spite of the dreadful state of her back, she nods her head and smiles—afterwards James King makes a fair copy, and reads it to the deceased—then, at her desire, hands it to her, and she, sitting up in her bed, reads it over to herself; there is not the slightest apparent difficulty either in sitting up, or reading the paper over—there is no allusion to the darkness of the room, or to the candle-light, and there is no mention of any spectacles in this part of the evidence. The instrument itself, marked D, is in a small and rather cramped hand, and it begins in these terms:—

Spinster                      Parish of Winterborn

"I the undersigned Mary Brydges, of H. G. in the County of Gloucester in addition to my last will dated the \_\_\_\_\_ day of \_\_\_\_\_ do now in sound mind and intellect, make this codicil:"—

This is the commencement of the codicil, and it is quite fairly and regularly written; it hardly needs a correction, except the introduction of the formal words of the "parish of Winterborn," and of "Spinster:" and the deceased was so capable that she could dictate a paper of this description without its requiring any alteration.

Having disposed of these legacies—amounting altogether to 18,000*l.*—she begins to doubt whether she had sufficient to pay them without reducing the legacy to Sir Harford Jones of 35,000*l.* stock to 20,000*l.* stock. Now the deceased was worth between 50,000*l.* and 60,000*l.*—was shrewd, and well acquainted with her concerns, and she had only disposed, by her will, of about 3,000*l.* in addition to the bequest to Sir Harford Jones; it was strange, then, that she should doubt, but it is not strange that the Kings should not be quite aware of the extent of her property, and should think it more safe to reduce that legacy. This revocatory alteration rendered a fresh copy necessary, but the deceased becoming fatigued, desired it to be made the next day; the fair copy, which had been written prior to the change in the amount of Sir Harford Jones' legacy being thought of, was unfortunately destroyed—why it should have been, no satisfactory reason appears. She was not, however, so fatigued but that she could sign a cheque for 325*l.*—a large sum—and, if this story of the draft were true, it, collaterally, would

support the capacity; at all events, as I have before remarked, the money was very convenient, and therefore conciliatory to Witchell.

Now I do feel a great difficulty in bringing up my moral conviction to a belief of all these circumstances, considering the condition of the deceased. What part of them may be true I cannot undertake to say; but, that none of them were thrown in for the purpose of giving the deceased the appearance of more volition and capacity than she possessed at that time, I cannot persuade myself; and, unless I can believe the whole, I must not rely on any part: it is not enough if the Court is not convinced that the witnesses are beyond suspicion; and, in my judgment, the credit of this witness is shaken.

The next morning James King draws out an A. B. sketch, and shows it to his friend Day—a lawyer—who suggests a few verbal alterations; that A. B. form is not produced, nor is Mr. Day examined. In the middle of the day, on January the 25th, James King is again sent for to come to the deceased immediately: it is a little extraordinary that he should be sent for, as the deceased had, the night before, desired him to copy the codicil, and bring it over with him, and it is not stated that she had become worse: the reason too assigned for not going—that he was busy at the counting-house of his employers—when his sister and the other legatees might lose their legacies by an unexpected death, is not very satisfactory, nor probable: he could not even attend to business of such importance as a codicil giving a legacy of 10,000*l.* to his sister, of 1,500*l.* to Gay, of 1,000*l.* to Hay, nor even, so far as appears, make an application to his employers to release him from their counting-house for half a day!

Again, he does not get to Hambrook Lodge till eight o'clock in the evening: the deceased was then asleep and he could not see her till ten: “at about ten o'clock, the deponent being desired, went up to the deceased, whom he found sitting in bed propped up, as before, with pillows: he had with him the draft and the fair copy. The deceased, on seeing him, complained that she had been sitting up to receive him, and of his having disappointed her: on explaining that business had detained him she was satisfied. The deceased then enquired, ‘whether he had completed the paper she had given him instructions for the day before:’ deponent said, ‘that he had, and hoped it was properly done:’ the deceased replied, ‘she hoped so too.’ He then, from his pocket, produced the aforesaid draft and fair copy, and proposed that he should read the copy to her, to which she assented: in the mean time the purpose of deponent’s coming being known, Thomas Gay, who announced him, went to call Thomas Witchell, who had gone to bed in the house; and deponent’s sister had brought Mary Cunningham into deceased’s room, as witnesses; deponent, in the presence of Mary Cunningham and of his said sister and Thomas Gay, read the fair copy aforesaid all over to the deceased in an audible and distinct manner, and having done so he enquired of her whether she was agreeable to her intention? and she answered, ‘perfectly so,—that nothing could be better!’ Deponent then handed the said fair copy, and also the draft aforesaid to the deceased, who herself then perused the said copy with evident tokens of approbation; saying, here and there, ‘very good,’ and nodding her head by way of assent: previous to commencing the reading the deponent proposed waiting until Thomas Witchell was dressed and present, but the deceased said it was of no consequence:—Thomas Witchell had come

in and was present at the time that the deceased, in answer to deponent's enquiry whether she approved of the said fair copy, approved of the same. The deceased having thus perused the said paper enquired whether the witnesses were ready:" [now this was after Witchell was in the room] "the deponent said that they were; and to facilitate the execution of the said paper, got a music-book, upon which he laid the paper, and handed a pen to the deceased, he holding the music-book and paper thereon in a convenient position, and his sister, Sarah King, a candle, the deceased signed her name at the foot of the paper, in their presence, and in the presence of Thomas Witchell and Mary Cunningham, and also of Thomas Gay. Having completed her signature, the deceased handed the pen to Sarah King, asking her, whether that (her subscription) would do. Before the deceased had signed her name, and in the act of signing it, she said aloud 'Now witness my hand.' The paper being so signed, the deceased desired the deponent to seal it, which he did in her presence, making an impression of deceased's own seal on black wax: when this was done, the deceased, addressing herself to deponent, in the presence of the several persons aforesaid, said, 'Now let this, or it, be properly attested?' He then read to Mary Cunningham and Thomas Witchell the clause of attestation, and he moreover to Thomas Witchell, on account of his absence when the paper was read to the deceased, explained to him that such paper, which he had been sent for to see executed, was a codicil to the deceased's will, whereby she had bequeathed ten thousand pounds to his (deponent's) sister, and some minor legacies to other persons. The said Mary Cunningham, next, Thomas Witchell, and lastly the deponent, in the presence of each other and of the deceased, then severally subscribed the clause of attestation as witnesses of the execution of the codicil. The deceased appearing fatigued, and expressing a desire to take her medicine, deponent and the other witnesses left the room, leaving the codicil on the table: he brought away with him the draft thereof."

The same observations will apply to this account as to that of the preceding night, respecting the great alertness, and readiness, of the deceased. It is strange that, as King came on purpose to have this codicil executed, and as Witchell was talked of, the night before, as a witness, that he should be allowed to go to bed. James King, indeed, says, Witchell came into the room on the night of the 24th; but that is contradicted by Witchell—but why was he suffered to go to bed when James King arrived at eight o'clock, and the immediate execution was only prevented by the deceased being asleep? It looks as if it were a contrivance that he should see as little as possible of the transaction—the bare act of signing: and some things are declared to have passed after his entrance to which he does not depose—such as the deceased enquiring whether the witnesses were ready—to which James King answered, they were—such as in the act of signing, her saying aloud "now witness my hand"—such as her desiring the paper to be sealed—the sealing it in her presence—her saying "now let this be properly attested." All these circumstances are thrown in by King, and are not mentioned by Witchell, but are, in a degree, contradicted; for he swears—"deceased said but little, and her head hung heavily."

The Court is perfectly aware that some witnesses will recollect what others do not bear in mind; and will sometimes place the parts of the transaction in a different order and detail; and therefore, it does not rely

much on these variations alone; but the important details and remarks stand, at least, on the uncorroborated testimony of James King: so far as Witchell is concerned, he does not confirm him in these particulars. In chief, King speaks of the sealing being by the desire of the deceased, and before the attestation—the paper itself shows that was not the fact—the seal was affixed, beyond all question, after it was attested, for the wax has run over the first letter of Bristol after Cunningham's name. On the 27th interrogatory King says;—

“The seal on the codicil in question was affixed thereto after Mary Cunningham had subscribed her name as a witness.”

Whether, on seeing the codicil to identify it at the end of his examination, he perceived that the seal had run over the writing, the Court is not aware, but the very positive and particular way in which he deposes, in chief, on this point, is clearly at variance with the fact:—

“The paper being signed by the deceased, she desired the deponent to seal it, which he did: the deceased then said, ‘now let this, or it, be properly attested!’”

Here, then, is a direct contradiction between his evidence in chief, and on interrogatory; and it is open to suspicion—that this variation arose from his observing the seal when he identified the instrument(a); or it may be, that, when he was cross-examined he forgot how he had told his story in his deposition: he was examined, in chief, on the twenty-eighth of November; and, upon interrogatories, on the fourth and fifth of December—at all events this leads to an inference—that truth is not the foundation of his deposition—for truth is uniform, and consistent.

Before proceeding to consider, more particularly, the circumstances respecting the draft, I shall examine the evidence of the other subscribed witness—Mary Cunningham—as far as it applies to the *factum*: she is a young woman of the age of twenty-five years, the daughter of a tin-japan manufacturer, in Redcliffe-street, Bristol, residing with her parents at Hill's-bridge Parade, and—“she commonly goes out, during the day, to work with ladies at their own houses; she does so more for the sake of employment than profit.”—This, though not very material, appears in her answer to the first interrogatory; she is a great friend of Miss King, who, according to James King's answer to the third interrogatory, has been residing, for the last six months, at the house of Cunningham's parents. If there was confederation between the parties to support this codicil, she would be taught to make the deceased very active in originating the transaction, as James King made her active in giving the instructions, and in the execution. Here again, therefore, the Court must look to the probability, and to the consistencies of the different parts of her own evidence, and to its accordancy with, or discrepancy from, that of James King.

“Deponent was acquainted with Mary Brydges, late of Hambrook Grove, during the two years next preceding, and until, her death: she made such acquaintance by going to visit Sarah King, who, between two and three years, and until deceased's death, resided with her as her com-

(a) The Court was informed, on its enquiry in the course of the argument, that it was not usual for the examiner to show the instrument, to which a witness was examined, till that witness had gone through the particulars of the execution; but to show it to him at the end of his examination-in-chief, in order that he might identify it.

panion. In the course of deponent's acquaintance with the deceased, she was in the habit of staying at Hambrook Grove, on a visit, for a week or ten days at a time."

Yet James King had never seen her there, and the workmen about the house never knew of the existence of such a person.

"Deponent and Sarah King had, for several years previously, been intimate friends: deponent was visiting and staying at the deceased's house aforesaid from the 22d or 23d day of January last past until the 26th of the same month. Deponent, the said Sarah King, and Thomas Gay, the deceased's man-servant, being together in deceased's bed-room (she being confined to her bed) in the morning part of the said 24th day of January, the deceased desired Thomas Gay 'to send Carpenter (who was employed in the stables and grounds) to Mr. James King, at Bristol, for that she wanted to see him on particular business.' At about ten o'clock in the evening of the same day, the deponent, who was sitting in Miss King's bed-room, received a message from the deceased, brought her by Miss King, saying, 'that Mrs. B. (meaning the deceased) wanted her.' Deponent accordingly went into the deceased's bed-room, Miss King going with her: they found the deceased lying down in bed, and James King with writing materials before him, at a table by the bed-side. Thomas Gay was also in the room. The deceased was conversing in a low tone of voice, she being very feeble, with James King, and she also said something to Miss King, who had gone, on entering the room, to the bed-side, whilst deponent remained at the fire: deponent did not hear, not taking notice, what the deceased then said to James King and his sister. When deceased had finished speaking to them, which occupied but a minute or two, she addressed herself to the deponent (who advanced to the bed-side), saying, 'My dear, I wish you to witness this codicil that I am now making in favour of my dear Miss King.' Deponent said, 'certainly, Ma'am.' The deceased, whilst so speaking, held in her hand a paper, which had just previously been given her by James King."

James King does not say one word about this.

"The deceased, just about the same time, was raised up in bed by Miss King, who propped her up with pillows."

According to James King, she was propped up when he first entered.

"And so sitting up, the deceased, to herself, read over, using spectacles, the paper so handed to her by James King, while Sarah King stood by, holding a candle to light her, the other candle remaining on the table where James King had been writing. When the deceased had looked over the said paper, she, speaking to James King, said, that she thought there was not money enough besides 'the thirty-five thousand pounds.' The deceased said much more to James King on that occasion, referring to the paper she had read over, than deponent can now recollect; but she well recollects that the tenor of what deceased said was, that she had not money to satisfy the legacies mentioned in the said paper, without deducting the same from what she had already bequeathed by her will. From what then passed between the deceased and James King, deponent found that the said paper would not do, and that she would not be wanted to witness it, and therefore left the room."

So that, on the evening of the twenty-fourth, this witness was only present for a short time, she came in after the paper dictated had been copied, and she left the room before the alteration in respect to the

35,000*l.*: nothing about the cheque passed in her presence. She goes on:—

“The following day, the 25th of January, she heard the deceased (being in her bed-room) desire Thomas Gay (also there) to send ‘Thomas’ (meaning Thomas Carpenter) for Mr. King: this happened about noon. At about 11 o’clock at night (of the same day), Sarah King came to deponent, who was sitting in her (King’s) bed-room, and said, that Mrs. Brydges wanted her. They went into the deceased’s bed-room together. Deponent found James King (of whose arrival she had heard ever since eight o’clock) and Thomas Gay already in the room: the deceased was lying down in bed.”

This witness differs as to that fact from what James King deposes.

“Deponent went up to deceased’s bed-side, and asked her how she was: she said, ‘much the same;’ and added,—‘she had sent for her (deponent) to witness a codicil she had made:’ deceased used the very words, ‘to witness a codicil that I have made in favour of my dear Sarah King, and other persons who have been so particularly kind to me during my illness; as I cannot die happy without leaving them something, and what I am doing is not enough to repay them for their kindness—especially my dear child’—meaning by ‘my dear child,’ the said Sarah King, of whom she frequently spoke by that appellation. The deceased then said to Sarah King, ‘My dear, tell Thomas, (meaning Thomas Gay, who was standing by the window) to call Witchell.’”

James King says nothing of this long conversation—nothing of this declaration,—not a very probable one at such a transaction.

“After waiting two or three minutes, the deceased desired James King, who was by the bed-side towards the fire (the curtains being on that side withdrawn, as the same were at the foot of the bed,) to read the codicil, or words to that effect; he, James King, having, when so spoken to, the codicil to be deposed of in his hand. She, at the same time, desired him not to wait for Witchell, as it was quite sufficient, that deponent was present. James King then, in an audible and distinct manner, read the said codicil all over from beginning to end: while he was reading, the deceased, two or three times, said, ‘perfectly right’—‘it is just as I wished it:’ and when the reading was over, the deceased (who, in the mean time, had been raised as before, into a sitting posture, and supported by pillows,) took the paper into her own hand, and, to herself, read it over. It was about this time that Witchell (who slept in the house, and had gone to bed) came into the room; she believes Gay had shortly preceded him. Deceased desired Witchell ‘to come round,’ meaning to the bed-side, which he did; and then said to him, ‘I wish you to witness this codicil to my will:’ the codicil was then either in deceased’s hand, or on the bed: the deceased then asked, ‘whether all was ready,’ upon which James King placed the codicil on a music-book, and held it in a convenient position (desk-wise) before the deceased, and handed a pen to her, while Miss King held a candle, standing close to the deceased, and deponent and Witchell close by, and in front of the deceased; who then signed her name at the foot of the paper, and having done so, said to Miss King, ‘Will that do, my dear?’ Mr. King then removed the book, and took the codicil, so signed, to a table standing in the pier between the windows, fronting the foot of the bed, where the curtains were undrawn, so that the deceased could see what was done there, and the candles were removed from the table at the bed-side to

the pier-table. James King having pointed out to the deponent the place, she signed her name as a witness to the codicil: he then handed the pen to Witchell, and read to him the clause of attestation, and told him that the paper was a codicil to the deceased's will; that it had been read over in deponent's presence, and that the deceased had thereby left his sister (Sarah King) ten thousand pounds, besides other legacies: Witchell then subscribed his name, and after him James King. Previous to the deceased signing her codicil, she desired James King to affix a seal to it; and, at the same time, desired Sarah King to fetch her (the deceased's) seal, with which, being brought, he, with black sealing-wax, made an impression thereon. Witchell left the room as soon as he had subscribed the codicil. Deponent herself, in a minute or two, after hearing the deceased desire Sarah King not to let her fall asleep without giving her her medicine, returned to Miss King's room, leaving James and Sarah King, and Thomas Gay with the deceased."

As to the capacity of the deceased, the same witness deposes:—

"The testatrix was, on the 24th and also on the 25th days of January, at the time of her giving instructions for a codicil to her will, and at the time of her executing the codicil, and on all previous and subsequent occasions of deponent being present with her, of sound, perfect, and disposing mind, memory, and understanding, and talked and discoursed rationally and sensibly, and well knew and understood what she then said and did."

She says, in a further part of her evidence, on the seventh interrogatory:—

"She knows not, and does not believe, that the mental faculties of the deceased were weakened from the latter end of October, 1825, or that her memory became impaired. The only difference respondent perceived in the deceased, from the first of her acquaintance with her until her death, was the alteration in her bodily health, and bodily weakness resulting therefrom."

So that, in point of capacity, there was no diminution of it from the time of her first acquaintance with the deceased.

In this part, again, Cunningham makes the deceased very alert—desiring Gay to send for James King about noon, but assigning no particular reason—nor was it very probable, as she had appointed him the night before: she describes the deceased as very much alive about Miss King—and very minute in her reasons for giving her 10,000*l.*—she states several circumstances after Witchell came into the room, which Witchell does not confirm—she, in chief, places the sealing with great particularity, even before the signing of the deceased; and she asserts that the deceased, at all times, both before and after, was in a state of perfect capacity: it is not a case, therefore, of temporary drowsiness, and stupor, with a power, on special occasions, of rousing herself to exertion. If this witness' account be true, it is extremely difficult to say that Baker's evidence is not false, but the latter is much supported by many unquestioned facts. In respect to the sealing, she also, like the other witness, very soon contradicts her deposition in chief. In answer to the third interrogatory, she says:—

"The word, or addition, 'Bristol,' following her subscription, is of her own hand-writing. She cannot recollect whether James King sealed the codicil before or after respondent had subscribed her name and addition aforesaid: she well recollects that the codicil was sealed at the

table standing between the windows, and by direction of the deceased: respondent being shown the codicil, cannot be certain whether the same was sealed before or after her subscription."

Now she was examined, in chief, on the 30th of November, and, to this part of the interrogatories, on the 1st of December: she, and James King, and Miss King, were all living together in the same house—the better recollection of Cunningham does then excite some suspicion, that she had had some conference with James King. This witness and James King, certainly agree in the general description of the deceased, and in some leading circumstances, but they are such as might have been preconcerted; though, even in some of these, they differ in several particulars: but where such a confederacy exists it will, more probably, and more decidedly, be detected upon some collateral broad fact, than upon the transaction itself. Here is a collateral circumstance, on which they were not likely to be so well prepared. James King, on the twelfth interrogatory, says:—

"On the 24th day of January, or night thereof, the deceased herself examined several bills and accounts, and her banker's book, previous to her desiring respondent to draw a cheque for her, as deposed of in chief."

On a subsequent interrogatory—the 15th—he answers:—

"That the cheque, being the exhibit, No. 1, shown to him, was signed by the deceased, in his presence, on the night of the 24th day of January, and by him was presented to her for such purpose, not immediately after the execution of the codicil in question, nor on the evening of the execution thereof, but immediately after the codicil or copy made from the instructions taken down in writing, deposed of in chief, had been destroyed. The deceased, next day, used the same inkstand when she executed her codicil, as was used by her when she signed the cheque."

This fixes the time of drawing the draft to the night of the 24th.

On the thirty-fifth interrogatory he answers:—"That he drew the cheque, by order of the deceased. Previous to naming the sum to be drawn for, she had various bills and accounts before her, as she sat up in bed: she looked the same over, and herself named the amount to be drawn for, and directed that the cheque was to be made payable to the producent. The deceased did not say any thing by which it appeared whether she did or did not know the balance of cash she had in the hands of her banker."

On the next interrogatory he says:—

"That among the bills and papers which the deceased examined, previous to her ordering the cheque to be drawn, was Gay's account book, in which were entered sundry house, and other expenses defrayed by him, among which, when due, he inserted his wages. Nothing was said, at the time deceased signed the cheque, as to the amount of Gay's wages, or the sundries for which he was to be repaid. The sundries, amounting to 42*l.* 13*s.* 9*d.*, were set forth in an account book, kept by the producent: the deceased herself looked over the bills referred to in Gay's book, and in that of the producent: having done so, she desired respondent to add up what the same, and 250*l.* to Witchejl, would amount to: he did so, and handed his calculation, on a scrap of paper, to the deceased, who looked over it, and then ordered him to draw for the amount of the total."

James King, then, directly binds himself down to this cheque being drawn on the evening of the 24th, after Cunningham had quitted the

room ; for it was after it had been determined not to have the codicil copied for execution that night. Here is a long and intricate transaction, in which the deceased is most minute and active, as if she were in perfect health—the time, and the circumstances are positively fixed, and accurately described—if true, here was capacity abundantly sufficient for a testamentary act—if true, I say—but it, certainly, is not very probable, nor consistent,—though she was so anxious about this codicil, yet so fatigued that she could not wait to have it copied,—that still she was so little fatigued, that she could go through all this settlement of accounts, examining various vouchers, when, for two months before, Witchell, although very eager for it (particularly about Christmas), could get no money—because the deceased was too weak to sign a draft: but this is a collateral matter; and, if the codicil be not founded in truth, it is upon such a matter, that the Court would expect the most striking contradictions to arise. It is necessary, then, to examine Cunningham's account of this exhibit: in chief, of course, she says nothing about it; because, if drawn at all, it was after she had quitted the room—it is on the twelfth interrogatory she speaks to this paper:—

“She never knew the deceased to be averse to parting with money, or to pay small sums: the deceased was very charitable: the exhibit, or cheque, marked No. 1, was signed by the deceased in her (respondent's) presence, and that of Miss King, and of no one else as she now best recollects, on the 25th of January, in the course of the day, and before dinner time (six o'clock), as she now best recollects, and verily believes. At the time the deceased was signing the cheque, she (deceased) and Miss King were in close conversation, so that respondent standing near the window did not hear or attend to what was then said. In the course of the same morning [namely, the 25th], and previous to her signing said cheque, the deceased, in respondent's presence and hearing, asked Miss King for Witchell's bills in order that she might know what she ought to draw for.” On a further part of that interrogatory:—“respondent is not sure whether the said cheque is or is not filled up and endorsed by James King: she is not well acquainted with his hand-writing: she thinks it very likely to be of his hand-writing, because the deceased often employed him in matters of business, as she has heard and believes.”

The witness, therefore, could not have been present when the draft was drawn, because it was filled up and endorsed by James King.

“She knows not whether the deceased did or not sign the cheque with the same pen and ink, as was used by her afterwards in subscribing the codicil: respondent was not taking notice at the time deceased signed the cheque: she did not actually see the deceased sign it; but saw her writing, Miss King being at the bed-side, and immediately after, respondent saw the cheque in Miss King's hand. She believes Gay was in and out of the room.”

Here, then, Cunningham fixes the day—the time of the day—and the persons present—in direct contradiction to James King:—the day—the 25th—not the 24th;—the time before dinner—six o'clock—not at eleven o'clock at night;—the persons present—herself and Miss King—not James King:—she enters into particulars—as sending for Witchell's bills in order to know what to draw for;—she sees the deceased writing, (no very easy operation for her)—Miss King standing by the bed-side—and, immediately after—the cheque in Miss King's hand. These are vari-

ances, which I find it difficult to reconcile, and it is as difficult to decide which to believe, or whether to believe either.

But these difficulties do not end here: on the next day she comes, and disavows these answers. It seems that she was examined to the end of the sixteenth interrogatory on the 1st of December;—on the 2d of December she corrects her former statement:—

“Respondent, since yesterday, has been reconsidering what she then deposed, in answer to the twelfth interrogatory, as to the day on which the cheque, interrogate, and produced to her, was signed. She now recollects more accurately, and deposes that the said cheque was signed in the evening of the 24th day of January last by the deceased, in the presence of respondent, Sarah King, and James King, who, at such time, drew out said cheque. Thomas Gay was also in and out of the room: she recollects, that the deceased told James King the sum for which he was to draw. She does not recollect any more that passed on such occasion respecting the said cheque, or the amount for which the same was drawn.”

Now all this must be equally false; or, at least, it is decidedly in contradiction to herself, and to James King. According to her deposition in chief, finding she was not wanted as a witness at the time, she had left the room before the burning of the fair copy; and according to James King there was a long transaction of business; the deceased had some bills and Gay's account before her, and he, King, wrote the items on the back and cast up the whole amount—this must have taken a considerable time. These various representations are quite unaccountable, except by referring to Cunningham's answer on the last interrogatory:—

“She came to town from Bristol in company with the producent, James King, and Thomas Witchell: she is staying in Bury Street, St. James'. Sarah and James King are also staying in the same house, as did Witchell while he was in town: she sees the producent and James King daily, taking meals with them: she has conversed with James King and Witchell since their examinations; but not on the subject of this cause, because Mr. Toller warned her not to do so: she has not had any conversation whatever with the producent, or James King, or Witchell, respecting their evidence, or with either of them respecting what she herself had deposed on the preceding days of her examination, or respecting this cause, or the codicil in question.”

James King, also, on the thirty-ninth interrogatory, speaks to their living in the same house, and at the same table; but “that he has not conversed with the producent, or either of his fellow-witnesses since their examination, or since his own in chief, on the subject of this cause: he was admonished not to do so, and has attended to the same.”

That is the way in which she ventures to answer that interrogatory. It is very difficult not to suspect—violently to suspect—that the contradiction arose from the two witnesses not having preconcerted what account they should give of this cheque: and it is equally difficult not to suspect, that there must have been, on the evening of the 1st of December, some conversation—some explanation, notwithstanding the very proper injunction from the Proctor; and that this correction by Cunningham sprung from that intercourse—James King, in his deposition in chief, having committed himself to the cheque being signed on the evening of the 24th. I find it therefore very difficult to believe that there had been no intermediate communication between them on the evening of Cunningham's first

statement, though James King, on the thirty-ninth interrogatory, unhesitatingly swears in the words already quoted.

Perhaps, without going further, this Court might be bound to say that it could not safely give credit to these two witnesses, and that the proof failed: but another important circumstance was pointed out by Dr. Philimore in the course of the argument. The codicil, in question, is written upon precisely the same paper as the will; not only the same black margin, but the same water-mark; and it is hardly possible that James King should have stumbled, at Bristol, upon a sheet of paper of the same sort as the deceased had happened to use, two years before, in writing her will: it is still less probable from another circumstance—the date of the paper; for it appears, upon further examination, that the date of the water-mark in each is 1813; so that James King, procuring a sheet of paper at Bristol to write this codicil, gets a sheet of paper of 1813, and that precisely corresponds with the paper of the will: this is next to incredible—it is a detecting circumstance. The counsel who spoke second in support of the codicil (for the first, if I remember correctly, did not advert to this observation), in accounting for this, was obliged to suppose that the fair copy had been made—not at Bristol—but at Hambrook, after James King's arrival on the evening of the 25th; for, had he deposed that it was written at Bristol, it was admitted it would be difficult to support his credit. His evidence is—and it is a material point—

That “on the following day, in order to satisfy himself that what he had taken down in writing was of a legal effect, he made a transcript thereof in blank, as to names, and the amount of legacies, and called on an attorney, of the name of Day, and submitted the same to him. Mr. Day made a few verbal alterations: the deponent, from the original draft, and the blank transcript corrected by Mr. Day, in the course of the same morning, being the 25th of January, made a fair copy agreeably to the deceased's directions, in order to the due execution thereof as a codicil to her will.” Further on he says—“he went up to the deceased's bedroom with the fair copy aforesaid”—[that is, the copy he had made at Bristol; for he had not made another]—and “from his pocket produced the aforesaid draft, and fair copy.”

On the twenty-eighth interrogatory he says—“that he did, on the morning of the 25th day of January (previous to drawing out, in its present form, the codicil in question), call at the office of Mr. Brooke Smith, an attorney in Bristol: Mr. Smith was not at home, in consequence of which respondent went to Mr. Day, before whom he laid an A. B. C. case for instructions to guide him in preparing the codicil in question. In the evening of the same day, and, after respondent had prepared and finished the codicil in question, he again (before leaving Bristol to go to the deceased) called on Mr. Smith, who was then, again, out of the way: respondent saw his managing clerk, Mr. Rawlinson, from whom he, verbally, enquired the form to revoke a bequest; which form Mr. Rawlinson wrote down on a piece of paper: respondent did so, to satisfy himself that the information he had, in the morning, obtained from Mr. Day was correct: he found that it was so.”

Here, then, the witness, not in one passage, but repeatedly, does fix himself with having written the codicil at Bristol before his return to Hambrook Lodge; the paper is nearly conclusive to discredit the witness to that fact.

The signature itself is suspicious—it is not unlike that to the first codicil—it is very dissimilar from those to the drafts signed by her within the last three months, and from that of the draft dated on the 24th or 25th of January—whichever it may be. And though Witchell supposes he may have seen this codicil signed, deception may have been resorted to, and the affair so managed as to impose upon him in that respect. Such a similitude to the former codicil, and dissimilitude from the drafts, is a circumstance not altogether free from suspicion, though it is not necessary that the Court should rely on it in the decision of this cause.

The whole transaction is clandestine, which, of itself, affixes a strong indication of fraud and contrivance. Here is not a single declaration by the deceased of a wish, about this time, to do a testamentary act of any sort—there is no recognition whatever by her that she had done any such act—there are no disinterested persons who have access to her, except Mr. Baker. Here is, on the following day, the 26th, a message—sent by Gay from Miss King—to Russell, that “Mrs. Brydges is much in the same state, and could not see him”—excluding Russell thereby. Here is subsequent concealment—not venturing to disclose the existence of the paper, as if conscious that it would not bear investigation—all these are confirmatory circumstances of suspicion.

Looking, therefore, to the improbability of the disposition—from its difference, in the character and amount of the legacies, from the former papers—looking at the condition of the deceased—considering who were the persons around her—that they are, most of them, closely connected together, and are materially benefitted under this paper—considering also the necessary jealousy of the law in guarding the beds of dying persons against fraud, and circumvention—I am of opinion that the evidence of the two subscribing witnesses (for the third can prove nothing sufficiently material) is so shaken in credit, that the validity of this codicil cannot safely be pronounced for upon such testimony: I, therefore, pronounce against it.

No costs have been prayed by Sir Harford Jones—either from a conviction, that the deceased intended, and ought to have done, something in the way of remuneration for Miss King—or from a hopelessness of ever receiving them, if given:—he has, perhaps, acted properly—but, certainly, very liberally, in not praying costs.

THE COURT, therefore, is not called upon to make any further observation on the subject, but merely to pronounce against the codicil.

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### DEW v. CLARK and CLARK.—p. 311.

A sentence of the Prerogative Court—pronouncing against a will, and decreeing administration to the daughter—having been affirmed by the Court of Delegates, and the cause remitted: the Court will not allow the execution of the sentence to be delayed—by a prayer for an answer to the interest of the widow, who had been cognizant of, though not cited to see proceedings—nor by a caveat.

21 Hen. VIII. c. 5. § 3. leaves it to the discretion of the Ordinary to grant administration to the widow or to the next of kin.

In the Goods of Dame SUSANNA GRAVES.—p. 313.

*On Motion.*

A monition against an administrator *pendente lite*, will be granted at the end of a suit, to compel him to transfer, to the person entitled, every thing in his possession acquired in that character.

A suit was lately depending in this Court respecting the validity of the will and codicil of Dame Susanna Graves, widow—promoted by William Blacknell Wilson, one of the next of kin of the deceased, against Robert Baxter, the surviving executor named in the said will; and afterwards against Daniel Heming, the executor of Robert Baxter, who died during the dependence of the cause.

An administration *pendente lite*—limited to the receipt and investment of the dividends due or to grow due on two certain sums of stock, “for the use and benefit of such person or persons as should thereafter appear to have a just right and title thereto”—was granted to Thomas Wilson, and Thomas Brooksbank, respectively the nominees of the parties in the suit.

The will and codicil were, on the 19th of February, 1827, pronounced to be valid; probate thereof was granted to Daniel Heming, and the limited administration *pendente lite* decreed to have ceased, and expired.

Mr. Heming had called upon the administrators to transfer the stock purchased by the dividends, as aforesaid, into his name: Mr. Wilson was ready, but Mr. Brooksbank refused, so to do.

*Lushington* now moved for a monition to issue against Mr. Wilson and Mr. Brooksbank, requiring them to transfer this stock into the name of Mr. Heming, the general representative of the deceased.

*Addams, contra.*—That it is impossible to comply with the motion, one circumstance will satisfy the Court—a petition was presented to the Vice-Chancellor praying, that stock belonging to the deceased’s estate, and standing in the name of the Accountant-General, should be transferred to Mr. Heming, and the application was refused.

*Lushington.*—The fact is, during the pendency of the suit, respecting the validity of the will, in this Court, the proceedings in Chancery were suspended: in that cause an order was made on Baxter—who had then a limited probate—limited to the property over which Lady Graves had a disposing power by settlement—to pay all stock into the Accountant-General’s hands; certain stock was transferred; afterwards the limited probate was revoked and a general probate granted by this Court to Heming. The petition to the Vice-Chancellor was in respect to a sum of 7,000*l.* in the hands of the Accountant-General; and was refused, because the matter could not be decided on an interlocutory proceeding, but must wait the final hearing; but no order has ever been made on Brooksbank to pay over the money in his possession.

*Per Curiam.*

An administrator *pendente lite* is merely an officer of the Court, and holds the property only till the suit terminates; as soon as it is concluded he must pay over all that he has received, in his character of administrator, to the persons pronounced by the Court to be entitled: his other functions are then completely at an end, and the Court is bound to take

care he discharges the duty committed to him, as far as the delivery over of every thing to the proper party. In the present instance if there is any contest or opposition respecting the property, application must be made elsewhere, but as it is my duty to enforce the transfer of the stock, I am bound to grant this motion. If, from the proceedings in the Court of Chancery, there is sufficient reason to stop this transfer, an injunction may be applied for.

Motion granted.

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In the Goods of JOHN O'BYRNE.—p. 316.

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*On Motion.*

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Administration being granted to a person out of his majesty's dominions, the sureties to the bond should be resident within the kingdom.

On the 16th of January, 1823, administration, under the sum of 100*l.* to John O'Byrne, was committed by this Court to Edward Gernon as the attorney of Mary Burke, widow—the lawful daughter of the deceased.

*Addams*—stating, that an increase in the property had arisen from the award of a sum by the Commissioners for adjusting the claims of British subjects on the French government—now moved the Court to enlarge the administration to the sum of 8,000*l.*; and to decree a requisition to issue to swear Edward Gernon, at Bourdeaux, to the truth of the premises, and to take his bond for the due administration.

*Per Curiam.*

This attorney is resident out of the jurisdiction of this Court; and the application is not only for a requisition to swear him, but also to take security; under these circumstances the sureties should be resident in this country; there should also be an affidavit why the additional grant is necessary, and it would be better to insert, if the fact be so, that no person in this country has a claim upon the property. This affidavit being brought in, the requisition may issue.

Motion granted.

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MACLAE and EWING v. EWING and CRUM, and also v. REID and Others.—p. 317.

Probate will not be granted to a paper never seen by, nor read over, but only explained, to the deceased—who died suddenly before he saw the solicitor; the answers of the executor (speaking against his own interest) being the only evidence of instructions which were verbally conveyed by him to the solicitor; especially when the intentions of the deceased appeared fluctuating, and when there was a previous paper, in his hand-writing, clearly entitled to probate.

THIS was a cause of proving, in solemn form, the last will and testament of Robert Ewing deceased, promoted by Humphrey Ewing Macclae, and Margaret Ewing—the executors named in a will bearing date the 1st of June, 1825—against James Ewing and John Crum—two of the executors named in a testamentary schedule, bearing date the

day of February, 1827, (without subscription) in which Mr. H. E. Macclae and Miss Ewing were also named executors. A decree, at the instance of the executors under the will of 1825, had been served upon various parties, citing them "to see proceedings."

*Lushington* and *Haggard*—in support of the testamentary schedule of 1827.

*Phillimore* and *Addams*—for the executors under the will of 1825.

*Jenner*—for Robert Reid (an executor under a will dated the 4th of November, 1818—and one of the persons cited)—objected to the answers of Mr. Macclae being received as evidence against his party.

*Lushington*—in reply—said, that the objection was not tenable; since it had been recently decided by the Court, that the answers of an executor named in two wills—both propounded in the same cause—might be read as against a third party(a).

JUDGMENT.

SIR JOHN NICHOLL.

Robert Ewing, the deceased in this cause, died on the 10th of February, 1827, at Dalby Terrace in the City Road, at the age of 68 years,—a bachelor, leaving an only sister who is since dead, and several nephews and nieces. His personal property is stated to amount to 18,650*l.*; and there was also a heritable estate in Scotland.—He had an illegitimate daughter—Margaret—(the wife of Robert Reid) who died in October, 1826—in the deceased's life-time: of the three children which survived her, two are dead—but that is a circumstance immaterial in the consideration of this case—for these children the deceased entertained the greatest affection, as also for his niece Miss Ewing; and it ever was an object—which he was very desirous to attain—that she should have the care and management of them.

The deceased had executed several wills—one, in 1808; by which he gave half his property to his daughter who was then unmarried—a second, in 1818, by which she had the same benefit, but trustees were interposed in order to protect the property from the engagements and controul of her husband. In 1825, he executed a third will—by which he left a life interest in one-third of the residue to his daughter, independent of her husband, with a power of disposal of the principal among her children; she being dead, I apprehend this third vests in the children: the other two-thirds were bequeathed to his niece, Margaret Ewing, and his nephew, Humphrey Ewing Macclae. This paper is uncanceled, and will, undoubtedly, operate if the paper propounded be not valid—for an intestacy is quite out of the question.

On the daughter's death, the deceased became anxious to make a fresh disposition of his property, and determined on making a new will. At this point of the case a considerable difficulty arises, as the only evidence to be obtained must be gathered from the answers of the executor (b)—for the solicitor received all instructions through him—and

(a) *Rich v. Mouchett and Isherwood*, Prerog. 7th July, 1824. The sentence in this case, establishing the will and codicil propounded by Rich, was affirmed by the High Court of Delegates on the 9th of July, 1825; and an application for a Commission of Review—afterwards made, and argued before Lord Chancellor Eldon, in December, 1825—was refused.

(b) Mr. Macclae having declined to renounce his executorship, the Court was moved to permit his examination, although a party to the proceedings, as being the only person who could give evidence on the principal parts of the allegation

though he may be a person of the highest honor—though the deceased may have placed the greatest confidence in him—and though he may be speaking against his own interest—yet, on answers alone, to pronounce for such a paper, is going a step further than this Court has ever previously gone. Another difficulty is, that the contents of the draft were not read over to the deceased; they were only communicated to him in the way of explanation, and he manifested considerable fluctuations of intention; the execution was postponed;—however, on a subsequent representation, he did consent to execute it: and, it is certain that, at that time, MacLae, and Druce the solicitor, must have thought that he intended to give effect to the disposition as contained in the draft, because a fair copy was prepared—still when it came to be read over it might have produced much discussion, and the deceased might not then have given it his full sanction and approbation. The blank—left for a clause regulating the disposal of the sum of 4,000*l.*, in case his niece, Margaret Ewing, made no appointment of it, and in case of the death of all his grandchildren—is most material; and when I consider that this unexecuted paper is to revoke a will—written with his own hand at no great distance of time—unless I could be quite certain that the deceased would have executed it without alteration, I could not pronounce for it.

Again, on the evening preceding his death, the allusion to the will of 1825, in the enquiry, addressed to MacLae, “whether a will in a man’s own hand-writing would be sufficient”—coupled with MacLae’s answer, “that he thought it would as to personal estate”—strongly shows that he had not finally decided to execute the paper propounded, nor to abandon the former will. Certainly, the deceased had no doubt as to the other legacies, but only as to the manner of securing the 4,000*l.* to his daughter’s children independent of the engagements of their father—still, on the whole, I think it safer to decree probate of the will of June 1, 1825—but I shall direct the costs of all parties to be paid out of the estate.

propounding the draft, dated February, 1827.—In support of the motion, a comparative statement was exhibited of his interest under the will of 1825, and under the paper of 1827; from which statement it appeared, that, under the latter instrument, his benefit was considerably less than under the former.

The Court, however, rejected the application.

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### HAWKES v. HAWKES.—p. 321.

The *prima facie* presumption is—that pencil alterations are deliberative—and those in ink final: when they are of both kinds in the same instrument the presumption is strengthened. A doubt whether a testator intended a particular bequest to form part of his will, and to take effect, will not vitiate the whole will, especially if a strong disinclination to die intestate be shown.

THIS was a very complicated case, from the obliterations and interlineations, in pencil, and in ink, appearing upon the face of the papers; and it has only been thought expedient to report so much of the judgment as elucidates the view which the Court took of those alterations.

*Phillimore* and *Addams*—in support of the two papers, A. and B., propounded by Samuel Hawkes—one of the executors therein named, and a brother of the deceased.

*Lushington* and *Dodson*, *contra*—for Francis Hawkes, also a brother of the deceased.

JUDGMENT.

SIR JOHN NICHOLL.

This case, on some points, is short and clear; but, on others, from the state of the papers propounded, and of other papers connected with them, now before the Court, it is one requiring a careful examination; but, after such examination, it seems free from doubt in respect to the proper decision.

The testator, James Hawkes, died suddenly, at Brighton, on the first of May, 1827, by the bursting of a blood-vessel, having on the twenty-first of October, 1826, in the presence of three witnesses, who have attested it, duly executed the will propounded: it is all in his own handwriting—it originated with, and was prepared by, himself—and his capacity is unimpeached. The will, therefore, when executed, was valid: so far the case, as to the *factum*, is short and clear—the question, then, is, how far it has been since altered and revoked?

After entering on a short statement of the history, circumstances, and family of the deceased, and of the substance of the will, and examining other papers in the cause, which it held not material to the decision of the case, the Court proceeded:—

The question then comes to the face of the papers propounded: there are various erasures, and crossings, and interlineations—some in pencil—some in ink: the general presumption and probability are, that, where alterations in pencil only are made—they are deliberative; where in ink—they are final, and absolute; but when they are of both sorts, the presumption as to each is stronger: if the writer had made up his mind, and intended the variation to be final, he would, instead of pencil, have used the other material—ink:—if he were deliberating only, and undecided, he would not use ink, but pencil. Upon the evidence also, upon the deceased's own declarations and conduct, and upon the nature and appearance of those pencil marks, I am satisfied that they were intended to be not finally revocatory—but only deliberative, and depending upon future acts. Against all the pencil alterations, and their effect, I shall, therefore, pronounce.

I come, then, to the alterations in ink: I have already said, that the presumption is, that the deceased had definitively resolved so to alter his will; and the parol evidence goes strongly to support that presumption; for the deceased, when he showed either the paper propounded, or some similar paper, to his solicitor, Faithful, a year and a half before,—desired him to make his notes in pencil, and not in ink, as he intended the instrument to be his will. The alterations in ink are made in a cautious and curious manner, tending to confirm the idea that they were meant to be permanent: the lines are struck through, not merely by hand—by drawing the pen through them in an irregular manner—but, to my eye, the obliterations appear to be made with the assistance of a ruler, forming a broad, dark, equal line, nearly effacing the whole writing; and, in one or two instances—(as where he varies the bequest to Dearlove—first increasing it from 2,000*l.* to 2,800*l.*, and then reducing it again to 2,000*l.*)—there are two or three parallel lines drawn across very carefully. These observations confirm me in the opinion that these alterations were made deliberately, upon due consideration, and intended

to be permanent and final. Similar observations apply in respect to the interlineations.

It is by no means certain, that these alterations may not have been made before the execution, and that these are not the identical papers shown to Faithful; nor is this even improbable; for, at the execution, the deceased so doubled up the papers as not to allow the witnesses to see more than was necessary to attest his signature: the alterations in ink may, therefore, have been previously made, and the will may be in the same plight and condition, except as regards the pencil marks, that it was on that occasion.

I cannot accede to the suggestion that, if the matter, in this respect, were doubtful, or if it were uncertain, whether the deceased did or did not mean any particular bequest to remain, or to be revoked, that such doubt or uncertainty would vitiate the whole will, and render the deceased intestate: nothing can be so manifest, as that the deceased did not mean to die intestate, nor that either his real or his personal property should be disposed of by law to his heir, or among his next of kin. But, supposing these erasures and interlineations to have been made after the execution, they would equally direct the distribution, at least, of the personalty; for the fact is clear, not only from the presumptions on the face of the paper, but from the parol evidence, that the deceased wished it to have validity, as his will, in its present shape.

The deceased had interviews with his solicitor long before, and long after, the execution of the will, one, eighteen months before his death—the will was not then interlined, and he was careful that any alterations should be made only in pencil: another, two months before his death—after the will had been executed, and then, the alterations in ink had been made; so that there is no improbability that it was altered previous to execution: the last interview took place on the 30th April—the night before the sudden death of the deceased—when (and this was his last act) he deposited this instrument with Faithful, at the same time declaring and publishing it, as his will, in case of his death before he completed a substitute by deed. Whether it can in every respect operate, or in all its parts carry the intentions of the deceased into effect, it is not necessary for this Court to decide; but I am satisfied that he did not consider any of the pencil marks as part of his will; and I am also satisfied, that he intended those alterations, which he has so carefully made in ink, to be final and effectual.

THE COURT, therefore, pronounces for the validity of these papers, but without the pencil marks, and writing in pencil.

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### LADY KIRKCUDBRIGHT v. LORD KIRKCUDBRIGHT.—p. 325.

The destruction of a latter will revives a former will nearly of the same import; the motive, on which the variation was made, having ceased to operate; and reconciliation to, and declarations in favour of, the universal legatee, under the former will, just previous to death, being shown: such revival being always a question of intention, and admitting the introduction of parol evidence. It is not settled, whether the principle of law is that, on the revocation of a latter will, a former will is presumed to revive, or not.

THIS was a cause of proving, in solemn form of law, the last will and testament (bearing date the 3d of November, 1824) of Sholto Henry,

Baron Kirkcudbright, who died on the 16th of April, 1827, promoted by Mary, Baroness Kirkcudbright, his widow—the sole executrix, and universal legatee, named in the said will, against Camden Grey, Baron Kirkcudbright—the natural and lawful brother, and one of the next of kin of the deceased.

The *King's Advocate* and *Lushington*—for Lord Kirkcudbright.

The question is, whether by the destruction of the will of 1825, the deceased proposed to give operation to the will of 1824: the presumption is against the revival, unless circumstances show the contrary. It is clear that the second will was intended expressly to revoke the first, and that the testator would have actually destroyed it, had he not been prevented by the party benefitted—who kept possession of it against his wishes. The will of 1825 has an express revocatory clause. No general declarations—no proof of affection—would revive a will under such circumstances. there must be clear evidence of intention; this is not a simple case of revival; but of recalling into existence that which the deceased would have destroyed if in his power.

*Phillimore* and *Dodson*—*contra*—were stopped by the Court.

JUDGMENT.

SIR JOHN NICHOLL.

The question, in this case, lies in a very narrow compass, and is free from difficulty. It appears that the late Lord Kirkcudbright executed a will on the third of November, 1824, of which he appointed Lady Kirkcudbright executrix, and universal legatee; and, on the thirtieth of July, 1825, he made another will, by which he gave a legacy of 500*l.* to Charlotte Bicknell; but again left, with that single exception, the whole of his property to Lady Kirkcudbright. In August 1825, he deposited this latter will with his bankers, where it remained till November in the same year, when he took it away himself: and, as it was not to be found at his death, it must be presumed that he destroyed it; and there is no circumstance to repel the legal presumption, though neither the time, place, nor manner of its destruction can be shown. It might have taken place immediately he got it from his bankers; and, even on the very day before his death, he had an opportunity of destroying it.

The former will remaining uncanceled has been set up by the wife, and opposed by the present Lord Kirkcudbright—the deceased's brother; who alleges that it is a revoked will, and that the deceased is dead intestate. It is not quite settled, whether the principle of law is, that on the revocation of a latter will, a former uncanceled will is presumed to revive or not. The presumption may depend, *prima facie*, on the nature and the contents of the will themselves, exclusive of circumstances *dehors* the will. If the latter will contains a disposition quite of a different character, the law may presume such a complete departure from the former intention, that the mere cancellation of the latter instrument may not lead to a revival of the former: but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed (because it is the rational probability) that when the testator destroyed the latter, he departed from the alteration, and reverted to the former disposition remaining uncanceled. This case strongly carries with it the latter presumption. Both wills are, in character, the same; the former gives his whole estate to his wife; the latter, after giving away only a small legacy, still be-

queaths the bulk of his fortune to her: it is a mere codicillary alteration, and it is extraordinary that it was not done by a codicil only. The destruction, then, of this latter document bears the inference that he merely meant to revoke the legacy, and then to revert to the former disposition exclusively in favour of his wife. That he considered both wills revoked, and purposed to die intestate, is, on reference to the acts done, in no degree, to my judgment, the correct view of the probable intention, nor the *prima facie* presumption. I should, therefore, be much disposed to hold, on considering the papers alone, and if no corroborating circumstances were adduced, that the will of November 1824, had revived. But it is admitted, that all such cases are questions of intention to be inferred from circumstances, and that extrinsic evidence is let in. It is hardly possible but that some facts, bearing upon that question, must exist; or that a case should ever arise resting only on the legal presumption. If it could be shown that he intended to revoke this will, and to die intestate, there is no rule of law that excludes such proof; nor, on the other hand, would a party be precluded from showing that, by the destruction of the latter will, the deceased proposed to re-establish the former. Accordingly, in this case, both parties have gone into evidence of intention, and the result of that evidence leaves no doubt upon my mind, that Lord Kirkcudbright believed and intended that the former will should remain valid.

It is true, that unhappy differences arose between the deceased and his wife, occasioned—not by unfounded jealousy, and violence of temper, on her part—but by profligate and insulting adultery, on his part, with his own servant, in his own house. But, notwithstanding these differences, and quarrels, he makes his will in November 1824, giving his whole property to his wife; and, though he tells his solicitor that he will delay the execution *in terrorem*—to induce Lady Kirkcudbright to acquiesce in his adultery—I cannot attach much importance to this fact as spoken to by Mr. Squire, since he does execute it, himself carrying it to a tradesman's, and getting witnesses to attest it. There was, therefore, a deliberate and decided intention to give his property to his wife; and the fresh will is as slight a departure as can be, from the original one. It appears also, that, with his propensity for other women, still he was much attached to Lady Kirkcudbright, even when he quitted her society; for, though in May, 1825, because she would not patiently submit to this adulterous intercourse being carried on in his own house, he actually separates himself (a), and goes off to London

(a) On the 4th Session of Michaelmas Term, 1827, an allegation was tendered on the part of Lord Kirkcudbright, pleading, that in the course of 1825, the deceased gave his solicitor instructions to draw up regular articles of separation between himself and Lady Kirkcudbright: the Court, however, rejected the allegation upon the following grounds:—

*Per Curiam.*

In this cause four allegations have been already given in, and publication would have passed on the first session of this term, if it had not been stopped by the assertion of the present allegation. In this advanced stage of the cause, the Court would not admit a plea unless it were sworn that the facts intended to be alleged were, not only *noviter perventa* to the knowledge of the party, but that he was advised that they were material and important to his case. The affidavit, brought in to induce me to admit this allegation, is deficient in this latter point; nor does the Court wonder at the omission, when it looks at the history as detailed in the pleadings and papers already before the Court.

After stating the facts as detailed in the judgment, the Court proceeded:—

with his cook-maid, and lives with her for two years, from lodging to lodging; yet he writes affectionate letters to his wife; sends her the newspapers; speaks of her most tenderly; pays her many little attentions; occasionally even goes down to Southampton to visit her; writes with a power of attorney to his friend Rudd, who manages his affairs, expressing his wishes for the comfort of his wife—"her convenience and comfort constitute the principal anxiety of his heart:" at last he gets tired, or sick, of his scandalous life, and becomes anxious for a reconciliation, and to return home. Under these feelings he makes a strange proposition—(for he is proved to be very eccentric though clever) that he should again cohabit with his wife; and bring back this very servant, under a solemn promise of having no further connexion with her: but, on his lady very properly rejecting that proposal—and, if he had any good sense, or feeling, he must have acquiesced in the moral tone of mind that rejected such an insulting offer—he gives it up; says, he likes her the better for it; and, at length, on Good Friday, April the thirteenth, 1827, he returns to his home, and to his wife. He was then in extremely ill health, suffering under an attack of inflammation in the chest. On his arrival, he was very kindly received. Sargent's account of her quarrelling with him after dinner, and, again, the next day, and of her neglecting him, is so inconsistent with the other evidence as to be entitled to no credit. She attended him to the warm bath that evening, and paid him all possible attention. It so happens that Rudd saw them there together:—

"She was, he says, assisting him to undress when he, the deponent, went in. The deceased observed to him, that he was glad he was come home, and addressed Lady Kirkcudbright in a kind and familiar manner." On that occasion, therefore, this witness perceived no want of cordiality between them. On the following day she was equally attentive and affectionate—she pressed Mr. Maul, the surgeon—who had some reluctance from the course of life Lord Kirkcudbright had pursued—to attend him. On the Sunday, in Maul's presence, the deceased expressed his gratitude to her in these terms:—

"He was afraid he should not live long enough to make her amends for the kindness she had shown him;" and Maul adds, "that the expressions struck him as singular, for he, the deceased, was not accustomed to acknowledge attentions from any one:"—and the next morning he was found dead in his bed. Here, then, is the fact of this return home and the renewal of conjugal kindness, in support of the conclusion drawn from the nature and contents of the papers.

In respect to these wills, the deceased had, in 1824, deposited his iron chest and writings with Rudd; and, in 1825, the will—the subject of the present suit—was also sent to Rudd by a servant, in a packet sealed

That differences did exist in the spring of 1825, there is no doubt;—that Lord Kirkcudbright actually withdrew from his wife, and cohabited with Bicknell, and that he made a will giving her 500*l.*, but in all other respects confirming his former will, admit of no question; after these facts are established, that articles of separation were prepared, but subsequently abandoned, cannot weigh a feather, nor carry the case one step further. It cannot be worth while again to open the suit in order to introduce matter of such extremely trivial importance. I shall probably consult Lord Kirkcudbright's interest in not allowing this plea to go to proof; but, whether this be so or not, it is my duty to the other party to reject it; and I reject it accordingly, and decree publication to pass.

*Allegation rejected.*

with Lord Kirkcudbright's arms. There is no direct proof whether it was sent by the deceased, or by Lady Kirkcudbright; but the deceased was at Southampton at the time, or had only just left it; and it was more likely to have been sent by him, as Rudd was his own confidential agent. It is not probable that it was sent without his privity, notwithstanding the declarations of Lady Kirkcudbright to the Eames', supposing those declarations to have been accurately recollected; still less probable is it, that he was ignorant of its existence in an uncanceled state—indeed it is proved that he was always aware of its existence, because he told Squire that if it had been in his custody, he would have destroyed it; and the very case set up admits this; for it is averred that he wished to obtain possession of that paper in order to cancel it, but that his wife would not deliver it up. This fact of his knowledge is most material.

It is said that there were declarations made by him when he executed the second will, that he would have destroyed it; but, first, no reliance can be placed on his declarations; and, secondly, the question is not what he intended when he executed, but when he destroyed the second will, knowing the first to be in existence. Counsel however have argued, that if he had destroyed it, it could not have been revived—but is it clear that he would, in that case, have destroyed the second will, without executing a new one; or, knowing of the existence of the former will and wishing it not to take effect, can there be any reason to doubt that he would have executed a short revocatory instrument, either making a new disposition or declaring that he meant his property to go according to law. Now in regard to the revival of the latter will, continued affection alone would perhaps not be sufficient, but instead of this the evidence is, that he declared his brother and sister should never have any of his property; that he was saving all he could to make his wife comfortable, as he told Eyton, and, more particularly, his friend Ross, who thus deposes:—

“He often heard deceased declare that he meant to leave the whole of his property to Lady Kirkcudbright: he used to say that his brother and sister should never be a shilling the better for him, but that my Lady (as he sometimes called Lady Kirkcudbright) should have the whole: upon one occasion, in the latter part of November, 1825, the deceased, alluding to the deponent's having recently sent her ladyship some wine by his order, observed, ‘that he hoped it was of the best sort, as it was for her own drinking,’ and he also, upon the same occasion, spoke of the manner in which he had endeavoured to secure his property to her as hereinafter deposed.”

Now the way in which he does hereafter depose, is on the ninth article:—

“That in all his communications with the deceased [and he was very intimate with him], both in June, 1825, and in November following, the deceased's general manner of speaking of his connection with Charlotte Bicknell was such as to indicate regret, not at the intercourse itself, but only as being the means of keeping him in a state of separation from Lady Kirkcudbright; and he always understood from the deceased, that it was his intention such connection should not deprive Lady Kirkcudbright of any of the advantages he intended her to have under the will, which he spoke of having made as before deposed:”—that is, the will of November, 1825.

In a further part of his deposition Ross says:—

“Bicknell was present, when the deceased, speaking to deponent, observed, ‘in consideration of Charlotte’s good conduct and kind treatment, I have settled 500*l.* upon her; she knows it to be the case, because she has seen the instrument duly prepared by a legal man,’ or to that effect: deponent observed, ‘he thought the deceased had behaved very handsomely,’ and Charlotte Bicknell acquiesced in some manner, in what he said. She afterwards left the room, and then deponent inquired, ‘how he had settled the said 500*l.*?’ The deceased replied, ‘you don’t take me to be such a fool; it’s all fudge; I merely said so to please the girl, and prevent her from relaxing in her attentions to me; I had a paper prepared by a legal man to give it the air of reality, and make her mind satisfied.’ He then gave deponent to understand that he either had destroyed, or intended to destroy the paper he had just been speaking of, which, he said, had until then, remained in his own possession; and he added ‘that he should give Charlotte ten pounds or guineas when he had done with her, and that, as he had given her a great many clothes, and kept her very well, he thought she would be very well paid.’”

These are the deceased’s own declarations, and his own account of the will of 1825. Why, if it was made with this view, did he get it back from the bankers, if he had not intended to destroy it? Why should he not have left it there? These declarations, coupled with the facts, show that he only executed it “to please the girl, and prevent her from relaxing in her attentions.” But this is not all; for he also tells his old schoolfellow, Cole, three weeks before he went home, that “as soon as he got to Southampton he would make a codicil in the deponent’s favour; that his will was at Southampton, in the possession of Lady Kirkcudbright; but that if he had it then with him, he would have got Mr. Weymouth, his solicitor in town, to have made the codicil at once.” He once, previously, observed to the deponent, “that he should take care to leave every thing to Lady Kirkcudbright, and that, whatever he might give to others, he would not injure her; but, thank God, he had something to spare for an old friend, when he was gone.”

Now, whether he would have made this codicil or not, is not the question; but here is the fact, that he knew the will was at Southampton. It further appears that, for some time before he went back to Southampton, he was tired of his life with Charlotte Bicknell, and declared “he should leave her with her friends, and only give her a few pounds,” which, possibly, he may have done when he parted with her. After, then, stating this evidence, it seems to me quite impossible to believe that he considered this will as revoked, or that he meant, or supposed himself to be intestate; or to doubt that he intended this will to operate. I, therefore, pronounce for it, and in so doing, I think that I do not interfere with any principles recognized by this Court.

Costs were prayed by *Phillimore*—but the Court said, that it was not, on the whole, a case for costs, as it was necessary to bring the question before the Court, though the allegation, ripping up the old quarrels, was rather uncalled for.

In the Goods of DELICIA AIRD.—p. 336.

*On Motion.*

A person, appointed limited executor in a will, may be appointed general executor in a codicil by implication, and without express words.

THE deceased was a spinster; and by her last will, after giving to Donald John Macpherson M'Leod, son of Major-General John M'Leod, of the 78th regiment, the sum of 2,122*l.* 11*s.* 6*d.* new four per cents, to be at his sole and absolute control at the age of sixteen years, and a vested right at her decease, and also all her plate, linen, books, and furniture to be vested, and at his own control in manner aforesaid(*a*)—thus proceeded:—

“I appoint the said Major-General M'Leod executor of this my will for the purposes herein-before-mentioned, and make no present disposal of any other property I may be entitled to.” Signed, sealed, &c. on the 24th of January, 1828.

This will was written upon the first side of a sheet of foolscap paper; and, on the second side, was a codicil of the same date, of which the following is a copy:

“I, the within named Delicia Aird, declare this to be a codicil to my will bearing date this day, and” [after bequeathing a legacy of twenty guineas each to two servants] “all the residue of my personal property I give to the within named Donald John Macpherson M'Leod to and for his own use, to be vested and at his own control at the same time, and *in like manner as the bequests in his favour in my will contained.*” In witness, &c.

The residuary legatee, it appeared, was of the age of eight years; and the residue consisted of about 300*l.*

The *King's Advocate* now moved for a grant of probate of the will and codicil to General M'Leod, as executor.

*Per Curiam.*

The Court was of opinion that the residue being bequeathed to the son, “in like manner as the bequests in his favour in the will contained,” came to him subject to the executorship of his father, and therefore granted the motion.

Motion granted.

(*a*) No other property was left under the will.

GREEN, by her Guardian, *v.* PROCTOR and NEWY.—p. 337.

A legatee—under a former will, who, after a long acquiescence, calls in probate of and contests a latter will, setting up a case of incapacity and undue influence, which is disproved—will be condemned in costs from the time of giving in an allegation.

*Semble*, a next of kin—a *fortiori* a legatee under a former will—contesting a will, under circumstances manifestly vexatious, may be condemned in the whole costs.

*Seemle*, that the guardian of a minor instituting a suit cannot be condemned in the costs incurred, after a proxy has been exhibited, for the party then become of full age.

In the Goods of MARY ALICIA GILL.—p. 341.

*On Motion.*

Probate of a will of a feme-covert (supposed, at the time of the grant, to have been sole,) revoked; and administration granted to *her* next of kin, the husband having died after her. The administration of a feme-covert's goods left unadministered by the husband, having been held, in several cases, to belong, under the 31 Edw. III. st. 1. c. 11. and 21 Hen. VIII. c. 5, to the next of kin of the wife at the time of her death, though the right to the property is in the representatives of the husband.

MARY ALICIA GILL was the party deceased: she died in the lifetime of her husband, John Gill, from whom she had lived apart for many years. On her death, a probate of a paper, purporting to be her will, was taken in this Court in the month of March, 1813, by William Cooper—the sole executor therein named—on the supposition that she had died a widow.

*Dodson* now prayed that the probate should be revoked, as the paper was executed during coverture, and was therefore null; and applied for administration to be granted to Alice Ainsworth, widow—the lawful mother of the deceased, she having left no children, nor father.

*Per Curiam.*

The practice of granting these administrations to the representatives of the wife, when the beneficial interest in the property belongs to the representatives of the husband (*a*) is very inconvenient, and in defiance of all principle. Notwithstanding the statutes (*b*) require that administration shall be granted to the next of kin, it has been solemnly decided that the residuary legatee is entitled, and it has always since been the constant practice so to grant it (*c*). In that and every other instance but the present, the right to administration follows the right to the property; but in a case said to have been argued here by Lord Mansfield (*d*), then

(*a*) By the 29 Car. 2. c. 3. s. 25. it is declared, that the statute of distribution (22 & 23 Car. 2. c. 10) shall not extend to the estates of femes-coverts that shall die intestate, but that their husbands shall have administration of their personal estate, and enjoy the same as they might have done before the act. Vide *Wilson v. Drake*. 2 Mod. 20. *notis*.

(*b*) 31 Edw. 3. st. 1. c. 11. 21 Hen. 8. c. 5.

(*c*) Vide *Thomas v. Butler*, 1 Ventris, 217.

(*d*) The printed reasons for the appellants—written by Mr. Hargrave, as junior counsel for Dr. Bouchier, in the case of *Bouchier v. Taylor*, on an appeal from the Court of Chancery to the House of Lords—asserted it to be settled, that soon after the statute of distribution, the right to administration, which exists at the death of the intestate, is transmissible—and that the representatives of that person, who was the next of kin, have the same right to it as such person, if living, would himself have. Lord Mansfield, in delivering his reasons against the decree of Lord Chancellor Northington (which was reversed) denied this position, and observed:—

“That he remembered arguing a case before Dr. Lee as Judge of the Prerogative Court, in which, after great consideration, the latter held the right to

at the bar, as also in a case before the High Court of Delegates, 1748, it was ruled that the Court was bound, by the statutes, to grant the administration to one of those persons who were next of kin of the wife *at the time of her death* (a): but if the persons, who at that time were her next of kin, die before the grant of administration, it has always been held that the Court may exercise its discretion.

I have directed the cases to be looked up, as I feel inclined, if the point should hereafter come before me, in a contested form, to send it up for the decision of the Court of Delegates, in order that the question may there be deliberately reconsidered.

In the present instance, I shall allow the administration to pass, a proxy of consent from the representative of the husband—who is a party to the proceedings in Chancery—being first exhibited.

Motion granted.

administration not to be transmissible as above described, but to be grantable to the next of kin for the time being.” On this Mr. Hargrave remarks—

“A case to the same effect, before the High Court of Delegates, was cited in Chancery by Lord Mansfield when Solicitor-General; and Lord Hardwicke allowed the practice of the Ecclesiastical Court to be so settled as to *administration*, though he decreed for a *distribution* in favour of a husband’s representatives on the principle of *transmissibility* from him as the person entitled to administration at the time of his wife’s decease. *Elliot v. Collier*, 1 Wilson, 168. 1 Ves. sen. 15. 3 Atk. 526. These authorities are certainly entitled to very great respect. But, on the other hand, there are cases according to which *the right of administering ought to follow the right of the estate*. In one case Sir Joseph Jekyll, master of the rolls, is represented to say, that this point had been so solemnly determined by the spiritual Court, *Bacon v. Bryant*, East. vac. 1729, in 11 Vin. Abr. 88. The same doctrine is asserted by the reporter in 1 P. Wms. 382, and by Lord Macclesfield in Cha. Prec. 567, and by Lord King in a case in 11 Vin. Abr. 87, pl. 24. The practice also of granting administration to the residuary legatee, in preference to the next of kin, seems to be an additional authority on the same side; for it proceeds on the idea that the statutes, requiring administration to be granted to the next of kin, were made with a view to their benefit, and, therefore, become inapplicable when the next of kin cannot, in any event, be entitled to the surplus of the estate to be administered. See further (*Rex v. Dr. Bettesworth*), 2 Str. 1111.” Hargrave’s Law Tracts, 4to. p. 475.

Sir George Lee was Dean of the Arches and Judge of the Prerogative Court of Canterbury, from January 1752, to December 1756; he was knighted upon succeeding to those appointments; and the Editor has been unable to discover any trace of such a case as that described by Mr. Hargrave to have been argued by Lord Mansfield during that period; he is inclined to think that a confusion has arisen between the names of Sir George Lee and Dr. Bettesworth, who was his immediate predecessor in the same offices; for in the case of *Elliot v. Collier*, 1 Wils. 169, there is the following passage:—“*Quære*, the case of *Hole and Dolman* at Doctors’ Commons in Michaelmas term, 1736, cited by the Solicitor-General, who said he was of Counsel in it, and that it was therein determined by the Judge and *all the doctors* (*not in the cause*), that the husband’s right of administration to his wife is not transmissible to his representative, but that it goes to the next of kin of the wife.”

*Elliot v. Collier* was argued in 1747, and, at that time, Lord Mansfield was Solicitor-General. The foregoing statement from Wilson is confirmed by the following entries, respecting the case of *Hole v. Dolman*, extracted from the assignation book of the Court of Arches:—

On the by-day after Trinity Term, 1736, *Common Lawyers* were directed to be heard, at the petition of both Proctors.

On the fifth session of Michaelmas Term, 1st December, 1736, the Proctors, on both sides, corrected sentences. The Judge having heard the Advocates and Proctors on both sides, and *the opinions of the rest of the Advocates present*, read the sentence, &c. &c. &c. &c.

(a) *Kinleside v. Cleaver*, vide *infra*, p. 150.

The following cases, upon this point, decided at different times, have been communicated to the Editor from the manuscript collections of the late Dr. Swabey, and from the notes of Dr. Arnold.

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WELLINGTON otherwise HOLE v. DOLMAN.—p. 344.

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*An Appeal from Exeter.*

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*Per Curiam (Dr. Bettesworth).*

THE COURT revoked the administration, granted by the Court below to the Reverend Robert Dolman, executor of Jeffrey Follett, late of Northam, in the county of Devon, of the goods of Margaret Wellington, otherwise Follett, late wife of the said Jeffrey Follett, and administratrix with the will annexed of the goods, chattels, and credits of Peter Wellington, late of Biddeford, left unadministered by the said Margaret Wellington; and decreed administration to Rebecca Wellington, otherwise Hole, wife of Henry Hole—the sister and next of kin of the said Margaret Wellington otherwise Follett.

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KINLESIDE v. CLEAVER.—p. 345.

MARY KINLESIDE, formerly Galton, died intestate in April, 1744: administration was granted by the Prerogative Court of Canterbury to William Kinleside—the husband—who, having made his will, and appointed his son sole executor, died; probate of this will was granted to the son by the Prerogative Court of Canterbury, and administration was prayed of Mary Kinleside's effects, left unadministered by her husband, to be committed to him as his executor. A proctor exhibited for Mary Cleaver—wife of William Cleaver—and alleged her to be the daughter—only child, and only next of kin of Mary Kinleside, formerly Galton, and prayed the *de bonis* grant to her.

On the fourth Session of Michaelmas Term, 1745, Dr. Bettesworth, Judge of the Prerogative Court of Canterbury, decreed the administration, *de bonis non*, to the daughter and next of kin of the wife.

On the 1st of July, 1748, this decree was affirmed by the High Court of Delegates, with *5l. nomine expensarum(a)*.

(a) The Judges who sat under this commission were:—

Sir Martin Wright, K. B.

Sir Thomas Birch, C. B.

Dr. Walker,

Dr. Simpson,

Dr. Pinfold,

Dr. Chapman.

Dr. Collier.

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WALTON v. JACOBSON.—p. 346.

THE question was—whether an administration, *de bonis*, should go to the representative of the husband, or to the next of kin of the wife.

*Per Curiam (Dr. Hay).*

The Court observed—It may be mistaken in whom is the interest—on that point it has no jurisdiction. The Court is ministerial, and must follow the statute: the statute Edw. 3. c. 11. having said the next lawful friend, and the statute of Hen. 8. explaining it to be the next of kin. There is no difference between the first administration and the administration *de bonis*. If the husband forgets to administer and dies, the next of kin will have the administration. I decree the administration, *de bonis*, to the next of kin of the wife.

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REECE (formerly MILNER) v. STRAFFORD.—p. 347.

*An Appeal from Worcester,*

JANE STRAFFORD (formerly Milner), wife of Thomas Strafford, was the deceased: her husband died without taking administration. The Court at Worcester granted administration to Sally Strafford, widow—the relict (second wife), and administratrix of Thomas Strafford. A citation issued, at the suit of Elizabeth Reece—the sister and next of kin of Jane Strafford deceased, to show cause why this administration should not be brought in, and a new one decreed to her. The Court, however, affirmed the grant; and the case now came, upon appeal, before the Dean of the Arches for his decision.

*Per Curiam (Sir William Wynne).*

The question is—whether administration of the wife's effects should be granted to the representatives of the husband, or to the next of kin of the wife? This has been long settled here. Formerly it appears to have been thought discretionary in the Court—perhaps because grants (without the statute or against it), are made to the residuary legatee. There are several cases. *Wellington v. Dolman* was solemnly argued in the Prerogative Court in 1736, and by Common Lawyers. *Elliot v. Collier*, in Chancery (1 Ves. Sen. 15)—a suit by the next of kin of the wife for an account—in which it was held that they had no right; but it is laid down, in that case, that the Ecclesiastical Court was bound to grant administration in that course. In *Kinleside v. Cleaver*—before the Delegates in 1748—the husband took administration: it was held that made no difference, and the grant was directed to issue to the next of kin of the wife. Since that decision the practice has been settled(a).

The only point for me to consider is, whether there is any objection to the citation: it was irregular, inasmuch as it only called upon the party to bring in the administration and show cause why another should not be granted, and that it did not say—to show cause why the original administration should not be revoked;—but the grant is revoked as to the party when it is brought in; the citation, then, was sufficient.

The Judge below granted administration to the only party asking it; when that was called in, he confirmed it. No costs were given in the first instance, but it is so clear a point here, that the party might have been satisfied on any advice, and, therefore, I give the costs of the appeal.

Sentence reversed.

(a) Vide Roper on Husband and Wife. Vol. 1. p. 205. 2d Edition.

## CONSISTORY COURT OF LONDON.

WEBB v. WEBB.—p. 349.

*(On Motion.)*

Facts of adultery newly come to the knowledge of the party may be pleaded after publication.

THIS was an application for leave to bring in an allegation, pleading further adultery on the part of Mrs. Webb, since the admission of the libel on the 10th of May, 1827.

The affidavit of the husband stated—that he came to London from Bath on the third day of February instant, and that, until the fifth, he had no knowledge, nor any information, that a criminal and adulterous intercourse had been formed and carried on between his wife and Thomas Walton; that he believes such criminal connection is still subsisting, and that he shall be able to substantiate by evidence the allegation now offered on his behalf.

*Dodson*—in support of the motion.

*Jenner*—*contra*.

*Per Curiam* (*Dr. Lushington*.)

It has been correctly stated, that the practice of the Ecclesiastical Court is to allow facts of adultery, that may have come to the knowledge of a party even after publication, to be pleaded: but such pleas must be strictly watched—they are open to suspicion, and care must be taken lest litigants should avail themselves of information from the evidence. In the affidavit before the Court, it is not sworn that the husband has not had access to and read the depositions—the presumption is that he has perused them. But in the case of Sir Wastel and Lady Brisco, 2 Add. 259, adultery was suffered to be put in plea long subsequent to publication—where the party was in full possession of the evidence taken on the original case, and where, if great diligence had been used, the fresh charge might have been sooner pleaded, the additional fact alleged being adultery with one of the female servants, and the birth of two children. Now, here, Webb is an attorney at Bath—he has professional avocations to detain him there; the adultery, if committed, has been in London, and he has not had the same means, therefore, of discovering any recent misconduct of his wife, as others might have possessed; and he has sworn, in his affidavit of the 9th of this month, that he only knew of this connection a few days before; he has then taken the earliest opportunity of bringing it to the notice of the Court. I shall watch the proof of this additional plea with great jealousy, but I must, according to practice, permit the allegation to be introduced.

Motion granted.

## HARRIS v. HARRIS.—p. 351.

1. In answers to an allegation of faculties, it is proper to state that the wife brought no fortune; but not that her father is possessed of large property.
2. The estimated value of all marketable securities must be included in the calculation of the husband's income, in order to the allotment of alimony, *pendente lite*.

THIS was a suit of divorce instituted by the wife on a charge of adultery. An allegation of faculties having been admitted, the answers of the husband were taken, and, in respect thereof, each party had made and brought in an affidavit. The sufficiency of the answers was the question before the Court.

In his answers to the first article, the husband claimed a deduction of 26*l.* 1*s.* 8*d.* as an annual payment for the assurance of the sum of 1,000*l.* on his life; and—in his answers to the seventh article—after admitting that he was entitled to six shares in the Economic Insurance Office, for which he paid 1,500*l.*; and also to one hundred shares in the Asylum Insurance Office, for which he had paid 480*l.*, but that some further instalments still remained due thereon; said, “that his (the respondent's) shares in the Economic were all mortgaged and assigned as a security to his agent for advances already made and to be made to the respondent, for the purpose of paying outstanding debts now owing by him, amounting to 250*l.* or thereabouts, and to meet the expenses of the present suit, and he therefore derives and will derive no income whatever from such shares; and he further saith that his shares in the Asylum Insurance Office are also at present unproductive of income to him, the rules of the said office requiring as a condition of his holding such shares, that the interest thereon be paid into the office as instalments of payment for the said shares, for which purpose such interest will be applied for the next six years at least.”

In a further part of his answer to the same article—“that he had not on his marriage, nor has he ever since had any portion or advancement whatever with his wife, although her father is possessed of a large property and income.”

*Phillimore* and *Addams*, in objection to the answers.

*Jenner—contra.*

*Per Curiam.*

In disposing of the objections, the Court observed that, in answers to an allegation of faculties, to state that the husband had received no portion with his wife was customary and proper; but the introduction of that part of the husband's answer to the seventh article—that his wife's father was in possession of a large property and income—was improper: it could have no weight in an allotment of alimony; and was inadmissible on two grounds: first, because it might lead the Court into an inquiry as to the amount of the father's property; and secondly, because there was no legal obligation on a father to maintain his daughter after marriage. The Court was also of opinion that the husband was not entitled to make any deduction in respect of the 1,000*l.* for which he had insured his life, inasmuch as a policy of insurance was capable, at any time, of being converted into money; and further said, that though it might be true, the shares in the Asylum Insurance office might not, in the first instance, be available as income, yet if the Court were to allow

this exemption, a husband might so invest his income as to evade all claims upon him for the support and maintenance of his wife.

The Court—after entering into a calculation to ascertain the amount of the husband's income—continued:

“Taking, then, the income of the husband at 250*l.* per annum, and considering that he has two children to educate and maintain, and that he will have to pay the expenses of this suit on both sides, I allot to the wife the sum of 75*l.* per annum, as alimony, *pendente lite*: she must have the means of furnishing herself with a decent subsistence.

THE COURT directed the alimony to commence from the return of the citation, and that the amount of all debts which the wife had incurred since that time, and which had been discharged by the husband, should be first deducted.




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## Easter Term.

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## ARCHES COURT OF CANTERBURY.

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The COUNTESS of PORTSMOUTH v. The EARL of PORTSMOUTH, by his Committee.—p. 355.

A marriage *de facto*, solemnized, under circumstances of clandestinity, inferring fraud and circumvention, between a person of weak and deranged mind, and the daughter of his trustee and solicitor (who had great influence over him and by whom he was clearly considered and treated as of unsound mind) pronounced null and void; and the pretended wife condemned in costs.

THIS was a suit of nullity of marriage instituted, originally, in the Consistory Court of London, on the part of the Earl of Portsmouth, acting by his Committee; and, in an early stage of the proceedings came up, by appeal, to the Court of Arches, where it was retained.

The cause was argued by *Lushington* and *Pickard* for the Earl of Portsmouth; and by the *King's Advocate* and *Dodson* contra.

### JUDGMENT.

Sir JOHN NICHOLL.

This suit is described as brought by the Earl of Portsmouth, acting by his Committee, against Mary Ann Hanson, falsely calling herself Countess of Portsmouth, to have a marriage, in fact solemnized between them, declared to be null and void in law.

The proceedings originated in the following circumstances. In January 1823, a Commission issued to inquire into the alleged lunacy of Lord Portsmouth:—the inquisition was executed—very long proceedings took place—the matter was strenuously contested—a great number of witnesses were examined—and the finding of the Jury was, “that

Lord Portsmouth is of unsound mind, so that he is not sufficient for the government of himself and his property, and has been in the same state of unsound mind from the first of January 1809." In consequence of this finding, Mr. Henry Fellowes, a distant relation, was appointed Committee; and, by an order made in the Court of Chancery, the Committee was directed to institute proceedings in the Ecclesiastical Court "for the purpose of annulling and declaring void the marriage of John Charles Earl of Portsmouth with Miss Mary Ann Hanson, now Countess of Portsmouth."

Thus the proceedings commenced in the Ecclesiastical Court. The verdict would not of itself affect the validity of the marriage, *de facto* solemnized—though solemnized within the time of the finding by the Jury. The finding is a circumstance and a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more; for this Court must be satisfied by evidence of its own, that grounds of nullity existed. Accordingly a long libel was given in, setting forth in detail the mental condition and unsound conduct of Lord Portsmouth, and the measures pursued to effect the marriage; his birth in December, 1767; the death of his father in 1797; the great weakness of his mind from the earliest period; his marriage with Grace Norton in November 1799; the settlement on that marriage, and the names of the trustees; Mr. John Hanson, the solicitor of the family, being one of those trustees. The libel goes on, that after that marriage his mental weakness increased until at length he became of unsound mind, that he so continued and still continues of unsound mind: averring, therefore, that he was from his birth and before his first marriage, not of "unsound," but only of "weak mind," which afterwards "became unsound." The libel then proceeds to allege a variety of facts from that marriage till the death of Grace Lady Portsmouth, as indicating unsoundness of mind, and proving that he was treated as a person incapable of managing his own property, and was always kept under a certain degree of superintendence and restraint. It further recounts Lord Portsmouth's conduct on the death of Grace Lady Portsmouth in November, 1813, and the circumstances attending the second marriage to Miss Hanson on the 7th of March following, to show that that marriage was not the act of a person of sound mind, but was effected by fraud and circumvention. It then details the subsequent conduct of Lord Portsmouth and the treatment he experienced, in continuation and confirmation of his former unsoundness. It mentions the birth of a female child at Edinburgh, in July 1822; his removal from thence just before that event by some of his family, and the subsequent proceedings under the inquisition already mentioned.

This is the general substance of the libel. The prayer of it is, "that the marriage may be declared null, by reason of the Earl being at the time of unsound mind and incapable of forming such a contract; and also by reason of the fraud and circumvention practised on him upon that occasion; and that Mary Ann Hanson may be condemned in the costs of suit." It consists of forty-nine articles, and on it sixty-seven witnesses have been examined.

On the part of Lady Portsmouth, an allegation in reply was given, setting forth that Lord Portsmouth—was possessed of a capacity and understanding fully equal to the ordinary transactions of life—was so considered and treated by all persons, till removed from Edinburgh on the 2d of July, 1822—corresponded with his friends—mixed in society like

other noblemen and gentlemen—in 1790, on coming of age, suffered recoveries with his father, and made a new settlement of his family property. It explained the arrangements on his first marriage, and detailed his observations upon it. It alleged that he settled accounts with his agents—attended public meetings and committees—prosecuted an offender and was examined as a witness in 1802—was much affected at the death of his wife;—that the second marriage was freely entered into—was his own act, and the result of no fraud;—that his family wrote letters of congratulation on that marriage;—that in 1814, Mr. Newton Fellowes, his brother, applied for a commission of Lunacy, which was refused;—that subsequently, in 1815, Lord Portsmouth executed a will and codicil, exercised his functions as a Peer, and cohabited with Lady Portsmouth till removed by force from Edinburgh;—and it exhibited many of his letters. This allegation consisted of above thirty articles, and fifty-seven witnesses were examined in support of it.

Upon the result of this mass of evidence, given by one hundred and twenty-four witnesses, on pleas consisting nearly of eighty articles—depositions more in bulk than in any cause within memory before these tribunals—the Court has to decide whether the marriage is null and void.

The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnized, the presumption is in its favour; but then it must be solemnized between parties competent to contract—capable of entering into that most important engagement, the very essence of which is consent: and without soundness of mind there can be no legal consent—none binding in law:—insanity vitiates all acts. Nor am I prepared to doubt, but that considerable weakness of mind circumvented by proportionate fraud, will vitiate the fact of marriage—whether the fraud is practised on his Ward by a party who stands in the relation of Guardian, as in the case of Harford against Morris, (a) which was decided principally on the ground of fraud—or whether it is effected by a Trustee procuring the solemnization of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendancy. A person, incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act. At all events, the circumstances preceding and attending the marriage itself may materially tend to show the contracting party was of unsound mind, and was so considered and treated by the parties engaged in fraudulently effecting the marriage.

In respect to Lord Portsmouth's unsoundness of mind, the case set up is of a mixed nature—not absolute idiotcy, but weakness of understanding—not continued insanity, but delusions and irrationality on particular subjects. Absolute idiotcy, or constant insanity, would have carried with them their own security and protection; for in either case the forms preceding, and the ceremony itself, could not have been gone through without exposure and detection—but here a mixture of both, by no means uncommon, is set up—considerable natural weakness, growing at length, from being left to itself and uncontrolled, into practices so irrational and unnatural as in some instances to be bordering upon idiotcy, and in others to be attended with actual delusion—a perversion of mind

(a) Harford v. Morris, 2 Consistory Reports, 423.

—a deranged imagination—a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist.

Such being the species of case alleged, what is the sort of proofs of its reality which are laid before the Court? The case is of that importance that I should have been disposed, for the satisfaction of the parties and the relief of my own mind, to have entered into the circumstances minutely, and to have quoted the depositions supporting the several circumstances; but the facts are so extremely numerous, and if detailed at all, require to be detailed with all the accompanying incidents in order to see their just effect, while the evidence is so very voluminous, that the attempt would be almost endless and impracticable.

To several of the most important articles of the libel, those which set forth the general state of Lord Portsmouth, and his conduct before the death of the first Lady Portsmouth, there are above twenty witnesses examined; so that the existence of the facts generally cannot be doubted, and the shades of difference become immaterial: to select the depositions of particular witnesses would not be satisfactory, as the individual depositions selected might state too much or too little—more or less than the fair general result of all the testimony.

The facts themselves in point of time happened, some before the marriage in question, others after.—Those before the marriage are the most important, especially those nearly approaching it, and they are also the most numerously deposed to; but those after the marriage are not immaterial as corroborative and confirmatory, and strengthening the presumption and the proof, of unsoundness existing at the marriage. Even the evidence as to the state of Lord Portsmouth, at the time of taking the inquisition, and the verdict itself, are not without weight, though nine years after the marriage. Applying to that time several medical gentlemen have been examined—persons particularly skilled in mental disorders—who had various interviews with the noble Earl, and they give a decided opinion that he was of unsound mind. Upon their opinion, and also upon the circumstances which they mention, it seems hardly denied that in 1823 Lord Portsmouth was unsound; and the explanation attempted is, that he might be in a state of excitement by being hurried down from Scotland (but that was six months before), or from knowing that the enquiry was then going on. However from the facts detailed by the medical witnesses—from their opinions as men of skill, confirmed by the finding of the jury—I am satisfied that at the time of the inquisition Lord Portsmouth was of unsound mind: so far the Court can have no difficulty at once in declaring its deliberate conviction. But some of the medical gentlemen read the affidavits, and they also (as I understand them) heard the witnesses examined at the inquisition, and upon that evidence, as well as upon their own observation and judgment, they carry back their opinions to an earlier period than the time of taking the inquisition. This testimony, therefore, is not without its weight and effect, even retrospectively; but the Court must principally rely upon the circumstances preceding the marriage in question, as spoken to by the witnesses produced on both sides in this suit.

Of the facts bespeaking unsoundness of mind, the persons examined to their belief that Lord Portsmouth was of “sound mind and capable of conducting the ordinary transactions of life,” were for the most part wholly ignorant. They themselves admit weakness of intellect. They

almost universally designate his lordship as a weak man. Imbecility is a matter of degree, and the degree of weakness differs in the same individual under different circumstances, and according to the different habits existing, and the different situations in which he is placed, at one time or another of his life. When the medical men give their opinion that the mental deficiency was connate, I do not understand them to mean that he was born either an idiot or a lunatic; but that his mind was naturally and constitutionally defective, and that its defect was not occasioned by any accident or supervening disease. At most, whatever may be meant by that expression, its being connate is only matter of opinion; it is not the case set up in the libel. Their opinion, however, if understood in the manner the Court has explained it, is confirmed by facts, and by the history of Lord Portsmouth. At school he was deficient, and not like other boys; he had especially that character of mind which afterwards accompanied him through life—timidity; he was easily intimidated and cowed; yet he was not incapable of instruction and of improvement; but the capacity of instruction and improvement is a quality possessed by a child at a very early age; it is possessed even by the brute creation; they can be taught, and can acquire things by habit and practice to a certain extent. Lord Portsmouth had a very good memory, and that in a great degree accounts for his receiving instruction, and also accounts for the wrong opinion formed by many witnesses; he could learn arithmetic and languages; but children of eight or ten years old are often perfect in the first rules of arithmetic, and make considerable progress in acquiring languages: it is principally an effort of memory. Lord Portsmouth then was capable of improvement, and no doubt all possible pains were taken to improve him and to qualify him to fill the high station in society to which he was born. He was sent abroad, and had the benefit of foreign travel; he certainly therefore was not considered an idiot, whose mind could in no degree be informed by education, or enlarged by observation.

In 1790, soon after coming of age, he joined his father in suffering a recovery, and in making a new settlement of the family estates, in order to provide for younger children: Here again he was not esteemed nor treated as an idiot; but an act of that sort, proper in itself, and done in concurrence with his family and natural guardian, is no great proof that he did not labour under considerable weakness of mind.

In 1797 his father dies, and though he is then thirty years of age, he remains under the care and superintendence of his mother, who is described as a very clever woman; and is managed by her.

In 1799 he marries Miss Grace Norton. Looking at the circumstances of that marriage—he 32 years of age, Miss Norton 47—and at the settlement then made, by which his property is placed in the hands of trustees; it is hardly possible not to be impressed that this was a piece of family arrangement, for the purpose of protecting a person, incapable of taking care of himself, and liable to be imposed upon, and to be entrapped into some improper connexion. With the propriety of that arrangement, this Court has nothing to do. The unsoundness of his mind might not at that time have grown to the extent which would render such a marriage, had under the protection and with the concurrence of his family, invalid; nor is it in question, so as to call for the expression of any opinion by the Court, either as to the propriety or the validity of that marriage. Under the maternal care of a wife nearly 50, a kind,

prudent, discreet lady, Lord Portsmouth might still further acquire the habit of conducting himself in society in the manner described; his property, put out of his own power, was in the hands of trustees; he had by this settlement constituted them, as it were, the committees of his estates; his domestic concerns were all in the management of his wife; she took not only the superintendence, but the entire control of every thing domestic; she acted as the committee of his person.

That in 1802, upon receiving a threatening letter of a most infamous kind, from a person of the name of Seilaz, whom it was judged necessary to prosecute, he should be able to give evidence in a court of justice, is no conclusive proof of any great extent of capacity, even at that time; it was a simple fact he had to prove, requiring little, if any thing, more than memory; nor does it appear that his cross-examination could require more than recollection of facts—not any considerable exercise of the understanding, and of the reasoning powers of the mind; yet even so early as that—in 1802—it was a matter of surprise and of subsequent talk, that he did so well; so that the previous impressions and public notoriety were very unfavourable to his understanding.

This examination is perhaps the strongest fact in support of his capacity; for his behaviour at parties, his receiving and paying visits, his making a few observations on the state of the weather, or on horses or farming, his going to public meetings, races, and county balls, are not incompatible with great imbecility of mind; still less are they incompatible with the existence of certain mental delusions and irrational fancies and practices when freed from observation and control. Under the restraint produced by the presence of formal company—under a sense of being observed—a person labouring under considerable imbecility, and some delusions, will pass as possessing a certain degree of understanding; much more than the individuals of the company would give Lord Portsmouth credit for, if they knew his condition when not so restrained: it is just in the same manner that a child in the presence of company will appear very different from his character when at play and unrestrained; but the conduct of such a person will more especially show itself to advantage when the superintendant is present to watch and to manage him, and by a nod or a look keep him within proper bounds, and prevent his exposing himself and his infirmities of mind.

Under these considerations, the great mass of evidence produced to the general conduct and deportment of Lord Portsmouth, and the opinion of his capacity formed by the witnesses, weigh but little against the facts proved as to his behaviour when under no restraint. It should, indeed, seem, that the more properly Lord Portsmouth was able to conduct himself under restraints and checks, the more strongly do the acts of which he was guilty at other times, when left to follow his own inclinations, wear the aspect of derangement rather than of imbecility. Unsoundness of mind does not show itself upon all occasions; nay, it can often only be discovered by probing and close examination—sometimes even requiring the clue or key that will lead to its detection. He knew he was a peer of the realm, and had learnt some of the rights and duties that belong to that high station; but he either was so weak or so deranged, that he was wholly ignorant of what he owed to himself and to his rank; as will appear by the facts to which the Court will very briefly refer.

What are some of the facts proved? I forbear, for reasons already assigned, to enumerate them with the details connected with them, as

that would lead to much length, and they have been in a considerable degree stated by counsel.

Grace Lady Portsmouth treated him with great kindness and indulgence, and it is not improbable that such indulgence might lead to the more complete perversion of his mind. If he had been kept under more restraint, he might have continued only a weak man, instead of becoming deluded and unsound; but what is his conduct?

His servants were his playfellows in town and country; he played all sorts of tricks with them; more particularly in the country, where he was less under observation, where he found additional playmates in his farm servants and labourers, and where he was less liable to notice.

He was fond of driving a team, and Lady Portsmouth so far indulged him as to have a team of horses kept for his amusement as a toy and a plaything, with which he carted dung, and timber, and hay; yet he used to flog these horses most unmercifully, and often in such a manner as to produce danger to his own person.

As further proofs of his unsoundness of mind may be added his propensity for bell-ringing, not as sometimes young men will do for exercise, but to share the money; this too by a nobleman of 40, at his own parish church, and near his own residence: his fancy respecting funerals, and his conduct and all the circumstances connected with that fancy: the slaughtering of cattle and the incidents attending that whim. Another trait is—his pleasure in malicious cruelty to man and beast; never expressing any regret—but “serves him right,” was his usual remark upon his own acts of cruelty. I allude only to these facts very generally, but to state them with the force and effect they have upon my judgment, would require a detail of the minuter circumstances connected with each of them.

A still more decided delusion of mind is that relating to lancets, and tapes, and basins in women’s pockets; the particulars of which, for the same, and even for additional reasons, I do not enumerate. The fact is proved beyond all question; it was a delusion that continued even to the time of the inquisition. Dr. Ainslie admits that “such a propensity is not consistent with a perfectly sound mind.” What the distinction is between a mind not perfectly sound, and an unsound mind, is not explained by the witness; nor what is the state of the capacity of a man who, when between 40 and 50, twice married, and living in society, supposes that the gestation of a woman could be fifteen months; nor of one who admits that he knew another man was in bed with his wife—that he remonstrated, but “they never took any notice of me”—and who does not resent this, nor take any steps for relief, because the man was “too strong” for him. These and other circumstances, admitted on the interrogatories by this witness, occasion his evidence to produce no alteration in my opinion, respecting the bearing of the facts before the marriage spoken to by the other witnesses; and the evidence of Swait, the bailiff, who is brought forward to contradict the facts, and to prove the correctness and propriety of Lord Portsmouth’s conduct, is equally nugatory; for this witness, on the interrogatories, admits—

“That he did sometimes control the noble Earl,” that “when he was running a little contrary, he threatened to tell Dr. Garnet of him.” “Respondent has sometimes wrested a whip out of Lord Portsmouth’s hand, when my Lord in play has cut him across the legs.”

What a picture is this of the noble Earl, from a witness produced to

prove his capacity and soundness of mind ! A nobleman of 40, flogging an old bailiff of 60 for his amusement, and in play cutting him across the legs! the bailiff not submitting nor quitting his service, but by force wresting the whip out of his hands! and the nobleman in his turn submitting to this indignity and forcible control!

I dwell too long on these circumstances. In 1808,—whether Lord Portsmouth, perhaps from over indulgence and loose given to his fancies, became less manageable, as a froward boy does, or whether Lady Portsmouth, from her advanced time of life, approaching 60, grew less equal to the task,—Mr. Coombe, a medical gentleman, was taken into the family to assist in superintending the noble Earl. That gentleman soon acquired an ascendancy, by pretending to quarrel with him, and threatening to demand satisfaction as a gentleman. This of course had the effect of reducing Lord Portsmouth to passive obedience; generally at least, for on two or three occasions passion got the better of timidity. From that time Coombe's presence alone was sufficient to check him, whether at play with the labourers, or whatever irrational fancy he might be pursuing. Mr. Coombe's attendance continued three years, till 1811, when he left, not because Lord Portsmouth had recovered, but because Coombe's private concerns required his attention. It may be proper to repeat that a feature in the character of Lord Portsmouth, which accompanied him all through life, was, that he was easily intimidated and controlled. This character usually marks and accompanies unsoundness of mind, whether it be imbecility or derangement, or a mixture of both: if a servant resisted him, he submitted and desisted; if a threat was held out to tell Lady Portsmouth, or Dr. Garnet, or Mr. Coombe, it produced the same effect, and among others (it is not immaterial) the threat to tell Mr. Hanson occasioned the same result. Mr. Hanson's influence and ascendancy over him, as one of the trustees—the acting trustee indeed—is fully established.

In November, 1813, Lady Portsmouth died. Lord Portsmouth's conduct was of that inconsistent character which distinguishes persons of such a mind: at the funeral he behaved as at other "black jobs," as he termed them—one moment overcome with grief, the next, merry again. He talked of a Miss De Visme as the object he was very anxious to engage—Miss Hudson, he said, was also suggested to him, but she was too old. The trustees thought it prudent to send him down to Hurtsbourne, attended by Coombe. Another wife was the string of his disorder, but Miss Hanson was never proposed by him as the object of his choice.

On the 28th of February, 1814, Coombe thought it prudent to bring him to London, and to deliver him up to his trustees, Hanson being one, and then in town—that day week he was married to the daughter of Mr. Hanson!—Hanson the confidential solicitor of the family—one of the trustees—who had a great ascendancy over him—who owed him every possible protection—married him to one of his daughters! It is unnecessary to state the jealousy with which the law looks at all transactions between parties standing in these relations to each other.

I will not enter into the particulars of the transaction—the whole of it will bear but one interpretation!—every part is the act of the Hansons!—Lord Portsmouth is a mere instrument in their hands to go through the necessary forms!—the settlement is begun in forty-eight hours after Lord Portsmouth's arrival in London!—the contents of that settlement

—the mode in which it is prepared—the concealment of the whole from the friends and the other trustees who were in town, some in the same house with Lord Portsmouth—all these particulars bear the same character. The necessary forms are gone through, but in support of these mere forms, not a witness is produced to show that this nobleman was conducting himself as a man, understanding what he was doing, or capable of judging, or acting as a free and intelligent agent:—nothing tending to show that he was a person of sound mind—nothing in his conduct inconsistent with unsoundness of mind—every circumstance conspires to prove that he was the mere puppet of the Hanson family, and that the celebration of this marriage was brought about by a conspiracy among them, to circumvent Lord Portsmouth—over whom they, and particularly the father, had a complete ascendancy and control, so as to destroy all free agency and rational consent on his Lordship's part to this marriage.

A marriage so had wants the essential ingredient to render the contract valid—the consent of a free and rational agent. The marriage itself and the circumstances immediately connected with it do not tend to establish restored sanity; it was neither “a rational act,” nor was it “rationally done”—the whole “sounds to folly” and negatives sanity of mind. The Hansons, in the mode of planning and conducting the transaction, show that they treated and considered Lord Portsmouth, as a person of unsound mind—and Lord Portsmouth, in submitting, acquiescing, and not resisting, confirms his own incompetency. Even if no actual unsoundness of mind, strictly so called—if no insane derangement had existed—if only weakness of mind—and all admit he was weak—yet considering the passiveness and timidity of his character on the one hand—the influence and relation of Hanson, his trustee, on the other—and the clandestinity and other marks of fraud, which accompanied the whole transaction—I am by no means prepared to say, that, without actual derangement in the strict sense, the marriage would not be invalid—but, in my judgment, Lord Portsmouth was of unsound mind, as well as circumvented by fraud.

As this is the great fact which the Court has to decide, it seems unnecessary to pursue the subsequent history. The Court gladly relieves itself from going through the disgusting particulars of the treatment which this unfortunate nobleman afterwards experienced from the pretended wife, and her family and associates—forbearance, in this respect, is for their advantage;—yet the subsequent treatment corroborates, and is confirmatory of, the former condition of Lord Portsmouth—no change in his mind and character is suggested to have taken place after the marriage—no supervening malady producing derangement of mind—he continued just the same as before the marriage in mental condition, though treated in a manner very different from the kindness of the first wife.

Upon the whole the Court pronounces, that the marriage in fact, solemnized between the Earl of Portsmouth and Mary Ann Hanson, is in law null and void; he being at that time not of sound mind, sufficient to enter into such a contract; and that the celebration of such marriage was effected by fraud and circumvention;—and pronouncing, as the Court feels bound to do, that latter part of its sentence, it feels also bound to grant the prayer for costs.

## CHEALE v. CHEALE.—p. 374.

*On Petition.*

A suit by the wife against the husband, having abated by the wife's death; the Court will not, at the petition of the Proctor, direct the costs incurred by the wife to be paid by the husband.

## PREROGATIVE COURT OF CANTERBURY.

In the Goods of JAMES GIBBS.—p. 376.

*On Motion.*

Where minors are concerned, probate in common form cannot be granted of a mere memorandum of doubtful construction, on affidavits showing that the deceased intended to increase the benefit to certain legatees under a formal will, and was prevented by death from giving his solicitor instructions to that effect.

JAMES GIBBS died on the 3rd of March, 1828. He left a widow and seven children—minors—four daughters and three sons. By his will, dated the 17th of February 1825, and duly executed, he appointed his wife (during widowhood), Samuel Pickering, and Thomas Gray, executors; and, after providing for the management of his business, and bequeathing legacies to his wife and three sons, he gave to each of his daughters 1000*l.* 3 per cent reduced annuities, absolutely, and 1500*l.* of the like stock for life—afterwards to their children; and the residue equally between all his children who should attain 21; the daughters' shares to them for life, and then to their respective children. The personal property amounted to about 25,000*l.* From an affidavit, it appeared, that the testator, during the last three months of his life, had frequently expressed to his executors, and to his eldest son, that he intended to alter his will and leave his daughters more property, in consequence of his eldest child, Mrs. Robinson, having died without issue; that on the 21st of February last, he wrote in the presence of his wife, a memorandum as follows:—

“Martha Eliza Cate Sofia, 3 R. 1300—1000 3½, if James settles and occopys the front house he must allow his brother Thomas 50*l.* a year for that”

The affidavit then stated, that he put this paper into his pocket-book, and both at that time, and on subsequent days, declared his intention of making an addition to his daughters' legacies; that on the 2d of March he expressed himself to that effect to his Solicitor, and appointed to attend, at his office, for that purpose on the following morning, but was prevented by sudden death.

The memorandum was found after the testator's death in his pocket

book; and *Lushington* now moved for probate of it, to issue in common form to his executors, as a codicil.

*Per Curiam.*

There are not sufficient grounds laid to enable the Court to grant probate of this paper. The original will is a long instrument, carefully prepared, and the disposition seems to have been maturely considered. The present paper was written as a mere memorandum, not as embodying the deceased's final intention. His object, as the affidavit tends to show, was to give a larger portion to his daughters; but the construction of the paper is obscure, whether the sum mentioned was to be an addition to, or substitution for, the benefit under the will; whether it was proposed to be given to them, absolutely, or for life, and then to their children. I should feel considerable difficulty in granting probate of this instrument even on a proxy of consent; but as on the present occasion the interest of minors will be affected, I am decidedly of opinion that the facts stated are insufficient to justify the Court in acceding to this motion.

Motion refused.

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In the Goods of RICHARD MORESBY.—p. 378.

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*On Motion.*

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The deceased supposing his will appointing his wife sole executrix and universal legatee for life to be lost, made in Peru a nuncupative will, (not in conformity with the statute of frauds,) with a general revocatory clause, and appointing two executors and his wife universal legatee absolutely. The executors renounced, and she took probate of that will in Peru. The former will being found (of which fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, granted to her.

THIS was an application from the widow of Lieutenant Moresby, R. N. that probate of his will, dated on the 25th of January, 1821, might be granted to her as sole executrix; and in support of her application she made the following affidavit:—

“That she was the relict of the deceased, sole executrix, and universal legatee for life named in his will duly executed and dated the 25th of January, 1821; that shortly after this period the deceased left England, in the command of a private merchant vessel, taking with him this will, and proceeded with his wife to Peru; that after their arrival, they resided principally on board; but that during a temporary absence of Lieutenant Moresby, the vessel with all his effects and papers, including his will, was captured by pirates, but was soon afterwards retaken: that on the occasion of such capture, the deceased lost several papers of consequence, and expressed his firm belief to his wife that his will had then been destroyed. That the deceased, as she has been informed, and verily believes, whilst at the city of Bolivar, was attacked by the illness of which he died; that on the 13th day of February, 1827, the day before his death, being incapable of writing, and fearing he might die intestate, he sent for a notary, in whose presence, and that of four other witnesses, he made a nuncupative will by declaring, that in contemplation of his death, he nominated and appointed two executors —both resident in the city of Bolivar—and his wife sole heiress, and

“revoked all his other testamentary dispositions; but that the said will  
 “was not reduced into writing in the lifetime of the deceased.” Mrs.  
 Moresby further made oath, “that upon the renunciation of the two  
 “executors in the proper Court at Lima, she there duly proved the  
 “nuncupative will, and administered the effects in Peru; and that  
 “shortly before the deceased’s death, and, as she verily believes, while  
 “he was at Bolivar in his last illness, she discovered among his papers  
 “on board, the will, dated 25th January, 1821, but that he died in igno-  
 “rance of that circumstance.” The affidavit further stated, that both  
 the executors were resident in the city of Bolivar, or some other part of  
 Peru, of which one was a native.

The only property of the deceased in this country consisted of about  
 500*l.* due for arrears of half pay:

*Lushington.* The question is, whether a nuncupative will made and  
 proved in Peru supersedes a prior will written and executed in this  
 country—whether the statute of frauds (*a*) does or does not affect such  
 a case. The widow, in asking probate of the will of 1821, waives an  
 interest which she would take under the will of 1827—in the former,  
 she has but a life interest—in the latter, she is absolute universal legatee.

*Per Curiam.*

It is not necessary here to decide the question (upon which there  
 may be some doubt) whether the statute of frauds would apply to the  
 nuncupative will made in Peru. Both wills contain nearly the same  
 disposition, and give the whole property to the wife; the latter, abso-  
 lutely: the former, of which she is content to take probate,—for life  
 only. It appears that the deceased did not intend to revoke the will of  
 1821, but supposing it to be lost, and being unwilling to die intestate,  
 he made the nuncupative will. As, however, the former has been re-  
 covered, there is no objection to probate thereof being granted to the  
 widow and universal legatee for life.

Motion granted.

(*a*) 29 Car. II. c. 3. s. 22.

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In the Goods of JOHN EWING.—p. 381.

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*On Motion.*

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Administration *durante minoritate* of children in the East Indies, decreed to the  
 uncle resident in Ireland, he giving full justifying security: the grandfather, to  
 whom as next of kin the grant would naturally pass, being upwards of 80, and  
 also resident in Ireland.

*Haggard* moved, on the affidavit of the Reverend William Ewing,  
 to the following effect.

*Per Curiam.*

The deceased was a Major in the Madras regiment of Infantry: he  
 died intestate, and has left three children who are minors—all resident  
 in the East Indies; and the Uncle, (the Reverend Mr. Ewing) who  
 lives in Ireland, is desirous of being nominated guardian to take out  
 administration for their use and benefit. The next of kin, whom the  
 Court usually appoints, is the Grandfather; but he is superannuated—

being eighty years old; he is also resident in Ireland: it would then be extremely inconvenient to appoint him, since he would hardly live till the minors were of age. The Uncle states the property to be in the hands of an agent, and under 500*l.*; and that he is willing to collect and invest it. He will give full justifying security so that the interests of the minors may be protected. With this precaution, and under the special circumstances of the case, the Court will, I think, exercise a proper discretion in granting this application.

Motion granted.

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LARPENT v. SINDRY.—p. 382.

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*On Motion.*

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In decreeing probate, the Court is usually regulated by the grant of the Court of Probate where the party was domiciled; i. e. the competent jurisdiction—in this instance, the Court of Supreme Judicature at Fort William, Bengal.

THOMAS BARNES, of the H. E. I. Company's civil service, died in May, 1826, in India. He left two testamentary papers—written with his own hand—bearing date respectively the 12th of April, 1825, and the 6th of May, 1826—both beginning in the same formal manner, and both disposing of the whole of his property, though differently. By the first will, which was duly executed, he appointed five executors; but by the second, no executor was named, though it contained this sentence—"which sum the executors thereafter mentioned;" and the paper thus concluded—"I feel too fatigued to write more." This paper bequeathed the residue to the deceased's natural son—a minor—who was, in December, 1824, consigned to this country for his education: the paper was subscribed, but not witnessed.

Of both these instruments probate had been granted, as the will and codicil of the deceased, by the Supreme Court of Judicature at Fort William, in Bengal, to John Palmer, Esq. one of the executors in the will of 1825, with the ordinary power reserved. Of the other executors, three were willing to renounce; and a decree had been served, in the usual manner, on the remaining executor, Mr. Sindry, who was resident at Bombay.

An exemplification of the probate in India having been transmitted to this country, *Lushington* moved for administration with the exemplified copy of the two papers annexed, as the will and codicil of the deceased, to be granted to Mr. Larpent, partner in the house of Cockrell and Co., the attornies of John Palmer the executor.

The property within the province of Canterbury nearly amounted to 2000*l.*

*Per Curiam.*

The form of the grant in India is not exactly according to our practice. Here the two papers would have been proved as together containing the will of the deceased: but the Court in India, which, as the deceased died domiciled there, is the Court of competent jurisdiction, has considered them as a will and codicil, and this Court is perhaps bound to follow it. The question how far this and other Courts of probate are to be governed by the decision of the Court of Probate where the de-

ceased was domiciled, has never been expressly determined, but I certainly should not feel inclined to depart from what has been the general practice, unless a strong case of inconvenience were brought under my consideration. I have, on the present occasion, the less difficulty in following the Indian grant, because I am not aware that there will be much difference in the ultimate result, whichever way the decree passes.

Let the administration with the exemplified copies of the two papers pass as prayed.

Motion granted.

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INGRAM v. WYATT.—p. 384.

Mere evidence of execution of a will and codicil by a person of weak and inert mind, appointing his attorney and agent sole executor and almost universal legatee of a large property, is insufficient, without proof of instructions by the deceased; instructions for the will being given to the solicitor, who prepared and attested it, by and in the handwriting of the executor's father, (also the deceased's co-agent and attorney); the codicil being prepared exclusively for his own benefit by the executor, in whose house the deceased was living apart from his family; and other circumstances strongly inferring fraud and circumvention.

JUDGMENT.

SIR JOHN NICHOLL.

JOHN CLOPTON, the deceased in this cause, died on the 20th of November, 1824, aged about 74 years, leaving Miss Barbara Ingram, his sister, and sole next of kin. His personal property amounted in value to 25,000*l.*; his real estate to 250*l.* per annum.

The will propounded bears date on the 4th of August, 1821: it bequeaths to his sister Barbara Ingram, 2,000*l.*; to his cousin Barbara Ingram, 4,000*l.*; to Hugh Carolan, 1,000*l.*; to the poor of Stratford-upon-Avon, 50*l.*; to Henry Wyatt, the residue both of his real and personal property; and appoints Henry Wyatt, sole executor.

The codicil, dated on the 5th of August, 1822, after reciting the clause of the will giving 2,000*l.* to his sister, revokes that legacy, and in all other respects confirms the will.

The will and the codicil are each attested by three witnesses; they are propounded by Henry Wyatt the executor; and are opposed by Barbara Ingram the sister of the deceased. The present question is on the *factum* of those instruments respectively; and the proceedings that have taken place are shortly these. The executor propounded the papers in a common *condidit* pleading instructions, execution, and capacity; the six subscribed witnesses were examined, and deposed to execution and capacity. Additional articles were afterwards brought in alleging the incapacity of Richard Wyatt (who received the instructions for the will from the deceased, and communicated them to the solicitor) in order to account for his non-examination; and on these articles two witnesses were produced.

In opposition to this case, the sister gave in a long allegation, entering into the history of the deceased, and of all his conduct and transactions, for the purpose of showing that this will and codicil were ob-

tained without testamentary intention and capacity sufficient to give them legal effect.

To that allegation a long reply was made in order to establish testamentary intention, and to confirm and support capacity. Upon these pleas, twenty-eight witnesses have been examined by the sister, and eleven by the executor, besides those before produced on the *condidit*, and additional articles: and it was upon their depositions and upon a great number of exhibits, which furnish very important illustrations of the case on both sides, that the cause was elaborately argued at the end and after the conclusion of last term.

The case is of considerable intricacy—involved in a great mass of testimony and multitude of facts—important in value, and as it affects character. There were also other suits occupying fully the time of the Court in an unusual degree up to the *Caveat* day; so that it was a matter of justice to all the parties, that the Court should take time to deliberate and to revise the evidence and arguments.

For the Sister it was argued—that the disposition was in favour of a stranger in blood,—that the parties interested were active in obtaining the instruments,—that the will was prepared from instructions conveyed by the father of the executor—the codicil by the executor himself,—that these persons were the attornies and agents of the deceased,—that the presumption of law was against the act,—that the law though not positively invalidating, yet required the clearest proof of unbiassed intention and full understanding of the nature and effect of, such instruments,—that the capacity of the deceased, though not intestable, yet was weak, and liable to circumvention and imposition,—that the evidence of the *factum* did not clear up these difficulties, and was insufficient to support the testamentary papers,—lastly, that there were such marks of fraudulent conduct in the executor as called for his condemnation in costs.

For the Executor:—that though by the principle of law, where parties interested were active in the framing of the testamentary instrument, and stood in a particular relation to the testator, a greater degree of vigilance was required in investigating the transaction, yet that this case would fully satisfy the most jealous examination,—that the deceased was not a person of doubtful but of perfect capacity,—that no circumstance of fraud attached upon the executor,—that the evidence on the *condidit*, and of subsequent recognitions and conduct, fully established the testamentary intention, and the validity of the will and of the codicil.

This is the general outline of the argument, though various collateral circumstances of detail were necessarily gone into; and in nearly the same order am I disposed to review the case, and—

First, to examine the principles of law applicable to the admitted facts of the case.

Secondly, to endeavour to ascertain the nature and degree of the deceased's capacity, and how far he was liable to, or secure against, imposition, noticing any circumstances creating a suspicion of any imposition having been actually practised.

Lastly, combining the condition and degree of the capacity of the deceased with the relation and conduct of the executor,—to consider whether the evidence of the *factum* is sufficient to satisfy the demands of

the law and the conscience of the Court, that this was the free act of a capable and intelligent testator.

A short statement of the admitted facts is necessary in order to consider the principles of law applicable to the case.

The deceased's original name was Ingram; he was the younger of two brothers, and had an only sister, the party opposing the present will. In earlier life he was wild and extravagant; and thereby (as Barbara Ingram, his cousin, states on the seventh interrogatory) "gave offence to his relations, and involved himself in much pecuniary embarrassment, and lived many years in a state of indigence." On a very narrow income,—an annuity of £72 left him by his father, and a portion of the Chetwode estate in Buckinghamshire, making together not quite £120 a year—(for whatever else he had acquired from his father seems to have been dissipated); he had for thirty years been leading a strange obscure life, in wretched lodgings or at coffee houses in this town; when in May 1818 his elder brother Edward, who was tenant for life of the Clopton estate near Stratford-on-Avon, of the yearly value of £1500, and who had assumed the name of Clopton, died intestate; and in consequence that estate devolved on the deceased for life, and he soon after changed his name: he also succeeded to half his brother's personalty, amounting to nearly £10,000, and to the other moiety of the Chetwode estate. At that time he was living in a lodging at Mead's, an engraver in Queen Street, Lincoln's Inn Fields, and occupied a room up two pair of stairs, at eight shillings per week. Shortly after his brother's death, he removed to lodgings at Hugh Carolan's, an apothecary in Charlotte Street, Fitzroy Square, where, in like manner, he had a room up two pair of stairs at the same rent. In the latter end of June, 1822, he went to Stratford accompanied by Carolan, who, leaving him at an inn in that town, on the following morning returned to London. The same day, the deceased was called upon by Henry Wyatt, who occupied Clopton House as his tenant: thither he was carried the next day, and there, with Henry Wyatt and his family, he resided till his death in November 1824.

This is a short history of the deceased; and it may be proper here to add, that on the death of Edward Clopton, Richard Wyatt and his son Henry, who were Attornies at Stratford, and agents to Edward Clopton, came to town and were met by Mr. Severne, an intimate acquaintance and friend of the sister, Mrs. Barbara Ingram, on whose part he was to act. On that occasion administration to the brother was taken out by the deceased, and Richard Wyatt and Severne became his sureties. Before Severne left town, half the funded property was transferred into Mrs. Barbara Ingram's name; the other half into the deceased's name, then John Ingram:—Wyatt and his son were to continue the agents and receivers of the Clopton estate; to remit the rents to the bankers—Messrs. Martin and Company; and the bankers were to receive the dividends, and when the balance in their hands exceeded 500*l.* to purchase stock. Matters being thus arranged, Mr. Wyatt returned to Stratford, and the deceased remained at his lodgings at Mead's, but soon after removed to Carolan's, as already stated.

Richard Wyatt appears to have come to town in 1819: the accounts at the stamp office were passed in that year, and a charge of 2*l.* for the journey is made in the accounts for 1818 and 1819, settled in June 1820, when Richard Wyatt was again in London. Those accounts are signed by both parties, and on the same day, viz. 30th of June, 1820. In July,

1821, the Wyatts again come to London, Richard the father about the 25th, Henry the son about the 29th, and on the 31st of July the account for the year 1820 is signed. Early in August, instructions, in Richard Wyatt's handwriting, are carried by Richard Wyatt to his town agent—Mr. Adlington—to prepare a will for the deceased. The draft of that will is prepared and sent by Mr. Adlington to Richard Wyatt, who returned it indorsed “4 August, 1821, ingrossed,” and, on that day, the will is executed in the presence of the executor. In respect to the codicil: the deceased arrives at Stratford on the 24th of June, 1822,—on the 26th he goes to Clopton House, soon after his arrival the draft of the codicil is prepared by Henry Wyatt—his Attorney and Agent—entirely for his own benefit,—on the 19th of July he takes it to a law stationer, who makes the copy—carries it back and delivers it to Henry Wyatt,—on the 5th of August it is read by Henry Wyatt to the deceased in the presence of one witness, and afterwards executed in the presence of three persons and attested by them.

Both instruments, then, are prepared from instructions, not given directly by the deceased—but through the intervention of the party interested,—and are executed in the presence of the Executor and Residuary Legatee—that person being the Attorney and Agent of the deceased.

Under these admitted facts, the first consideration is whether the law has established any principles specially applying to such a state of circumstances. The Court has been referred to the case of *Paske v. Ollat*, 2 Phill. 323. The same doctrine is held in *Billinghurst v. Vickers*, 1 Phill. 193; it is hardly, however, fit for me to depend much upon those cases, as it would be relying upon my own authority; and I shall, therefore, only say that I see no reason to depart from the opinions there expressed; but as the present case is important, it may be proper to advert to some authorities in support of the principles maintained in those decisions.

By the civil law, if a person wrote a will in his own favour, the instrument was rendered void.<sup>(a)</sup> That rule has not been adopted in its full extent by the law of England, which only holds that such conduct creates a presumption against the act, and renders necessary very clear proof of volition and capacity: nor does the law of this Court determine that the act is absolutely void, even though the person making the will is the attorney and agent of the testator. The suspicion is thereby increased; and for obvious reasons: the testator reposes confidence in his Attorney, and is less on his guard against imposition: while the Attorney, from skill and knowledge, is more likely to be successful in such a contrivance, and has more influence so as to obtain a blind acquiescence. Courts of Equity have in many instances set deeds aside on account of the relation of influence in the person obtaining, and of confidence in the person granting the benefit; as in the cases of *Guardian and Ward—Attorney and Client—Agent and Principal*—and the like—more particularly in respect to Attorney and Client. As, for example, in *Walmsley v. Booth*, 2 Atk. 25—27:—it was this case. “Japhet Crook in 1728 being under several prosecutions for perjury and forgery employed the defendant Booth as his attorney to get bail, which he accordingly did; Crook himself having used many fruitless endeavours for that purpose: during this

(a) Vide Dig. lib. 48. t. 10. s. 15. and lib. 34. t. 8.

transaction Booth drew Crook's will, who directed a legacy of 1000*l.* to the defendant, and 500*l.* apiece to the bail; the defendant, subsequently, got a bond for the security of his legacy. Crook afterwards revoked the will, and by another appointed the plaintiff, Mary Walmsley, executrix, and made her his residuary legatee. After the death of the testator, Booth brought an action on the bond, and obtained a verdict and judgment; and a bill was filed to be relieved against it on the ground of fraud;—Crook living six years after giving the bond, and not attempting to be relieved, Lord Hardwicke decreed for the defendant." However, in the course of his Judgment, the Lord Chancellor said,—“To be sure it is extremely wrong in an Attorney to take bonds for services; but if a client, with his eyes open will give such a bond, it would be going too far to say such a bond is absolutely void. This case has been compared to that of young heirs in distress for money in the lifetime of their fathers, but I do not think this comes up to the present case, for there the Court presumes weakness in the person and upon that consideration; but there is no pretence for it here, for Crook was more likely to impose than to be imposed upon; and yet if there had been the slightest evidence of imposition upon Crook, I should make no scruple of relieving against this bond.”

The slightest evidence of imposition then, even in the case of a very shrewd man, as Crook is represented to have been, would have been sufficient to set aside the bond.

The case afterwards came on for a re-hearing, when Lord Hardwicke reversed his former decision; and, on reversing it, said—“that it was a case of a good deal of consequence: that it had been compared in the first place to the defrauding of young and improvident heirs, where the Court relieves on the general principle of mischief to the public without requiring particular evidence of actual imposition upon them, and they are cases of general concern: they also give relief, because the circumstances and situation of young persons at the time of the agreement make them extremely liable to imposition.”

In a further part of his Judgment, the Lord Chancellor says—“I think the case is stronger between Attornies and their Clients, than any of the cases it has been compared with; because all Courts order their bills to be taxed; and there are a number of cases in this Court where a client unassisted by an attorney has paid a law bill and accepted of a receipt for it, and yet has been allowed to open the whole account notwithstanding, and to take exceptions to an improper or extravagant charge in the attorney's bill. Nay, even if a client has given an attorney a bond or mortgage to secure the payment of what was charged to be due to him on account of a law suit, the Courts of Equity have relieved the client, and ordered the bill to be taxed. And what is the reason the Court goes upon in such determination? Why, the great power and influence that an Attorney has over his Client.”

On this second hearing the bond was set aside. So, in *the case of Saunderson v. Glass*, 2 Atk. 297, it was laid down in the course of the hearing, that “if an Attorney, *pendente lite*, prevail to agree to an exorbitant reward, the Court will either set it entirely aside, or reduce it to the standard of those fees to which he is properly entitled.”

Now these cases show that there is a particular jealousy and anxiety on the part of all Courts in guarding suitors against that sort of influence

and knowledge which attornies possess and may exercise injuriously towards their clients. There are other cases to the same effect.

In *Gray v. Mansfield*, 1 Ves. Sen. 379, a deed by one just come of age to an agent, as a bounty or gift, though there was no fraud, was in part, set aside; so in *Pierce v. Waring*, cited in that case, a deed to the late guardian was annulled; and in *Oldham v. Hand*, 2 Ves. Sen. 259, the same doctrine was recognized.

The cases then show how extremely jealous the law is to protect the unwary against undue influence and controul. Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. As in the case of an interested witness, it is not necessary to prove falsehood;—a court of law will not hear him at all;—so in the case of such an executor, it is not necessary to prove fraud and circumvention—he must remove the suspicion by clear and satisfactory proof. To show that such has been the doctrine of this Court at all times, (because it is the doctrine of common sense and of sound justice) I will state a note of a Judgment of one of my predecessors, Dr. Calvert, who was as able and as excellent a Judge as ever filled the chair which I have now the honour of occupying. The case is *Middleton v. Forbes*, decided in this Court in Trinity Term 1787. I was not of counsel in it, but was at the bar at the time. It was very elaborately argued by Dr. Wynne, the then King's Advocate, and by Dr. Scott, now Lord Stowell, in support of the will—and by Dr. Harris and Dr. Bever for the next of kin. The Judgment will sufficiently show the circumstances of the case.

“John Wilcox died on the 21st of October 1778, leaving a will dated on the 5th of August 1776. The contents are in substance as follows:— ‘he describes himself as John Wilcox of Ringwood—cousin, heir at law, and sole next of kin of William Wilcox, late of Portsmouth Common, deceased: he directs his debts to be paid; he leaves—to two female servants of his late cousin, annuities of 10*l.* 8*s.* each—to his niece, Catherine Wilcox, and to his cousins, James Middleton of Ringwood, and John Middleton of Rumsey, all his property real and personal as tenants in common; if his niece shall have no issue he bequeaths her third of the real property to the Middletons—he appoints James and John Middleton his executors. The will is signed by the deceased and attested by three witnesses.’ As to the state of the deceased: he had lived at Ringwood, a poor man, but by the death of his relation, he became possessed of about 3,000*l.* Immediately on the death of this relation, Middleton, receiving notice, carried the deceased to Winchester, Ot administration to his cousin, then carried the deceased to Portsmouth, where William Wilcox had died, and soon after obtained this will. The Middletons afterwards got a deed of gift from the deceased, took possession of the estate, and kept possession of it till 1781, when Forbes took out administration to the deceased and proceeded against Middleton, in Chancery, to set aside the deed. The deed was set aside, and the decree affirmed by the House of Lords. During the proceedings in Chancery, no mention was made of this will. The will has now been set up here. Objection is taken to it in point of law as giving the property to the Attorney, and cases have been quoted in Chancery, showing that the objection would there be valid; but that rule has never been adopted here. In the testamentary cases quoted, *Barton v.*

*Robins*, 3 Phill. 455, *notis*, and *Ousley v. Wells*, Prerog. Trin. Ter. 1777, there were other circumstances of fraud upon which the wills were set aside. It is objected also, that the subsequent deed revoked the will; but that is not so: for the deed disposed only of part of the property—the will applies to the whole. Overruling, therefore, the legal objections, I come to the facts of the case; and the question is, whether there is proof that this was the unbiassed act of the deceased. The first consideration is his capacity. It is admitted he was a drunken man, whom the boys followed and hooted—boys do not follow a mere drunken man, but an antick man playing tricks, such as this man did: his relations considered him in this light, for they made him a small weekly allowance. On his receiving this 3000*l.* the Middletons immediately carried him away and had the entire management of him—he had no regard for money—he was entirely under the direction of the Middletons, and under their custody—though not actually shut up—at Portsmouth, at a distance from his relations—the will was made by the person who had the beneficial interest—*Qui se scripsit hæredem* renders the will void under the civil law, though it is not so by the law of England. A deed is also obtained for the same purpose, and though the setting aside of the deed does not establish fraud, yet it is a corroborating circumstance. The ineptitude of such a bargain might be a sufficient ground to set aside the deed, but not the will, which does not take immediate effect. Yet the obtaining such a deed does come strongly to corroborate the fraud of the will: it shows that the testator was liable to imposition, that he executed a deed which he ought not to have executed, and that the Middletons obtained a deed they ought not to have obtained. In *Ousley v. Wells*, Sir George Hay laid the foundation of the fraud, on the part of the executor in his amusing the next of kin in order to prevent their taking administration till he had obtained probate—that showed a *mala fides*—here is a much stronger instance of *mala fides* in obtaining this deed—still this may be done away by full proof of the *factum*. Two of the attesting witnesses are dead, only one is surviving—here are no instructions—though instructions are not necessary where the capacity is not doubtful, yet where imposition and custody are suspected the defect of instructions is extremely material, more especially when the writer makes himself executor. Collins, the subscribing witness, says that a conversation passed between the deceased and Middleton, and the witness's father about a will; but not that the will was prepared by the direction of the deceased, nor does he specify the conversation. The evidence of the execution does not specifically detail any thing as originating with the deceased himself, but merely what he said in answer to what was put to him.

“This is all that comes out to clear up these doubts, and to remove the suspicion of fraud: every thing originates with the Middletons—it seems a concerted plan to obtain this will—they show that they thought the deceased liable to imposition, otherwise they would have trusted him, and not got the deed: they were afraid of the continuance of his affection, lest he should fall into other hands.

“Upon the whole, I do not think the evidence of the execution does away the suspicious circumstances of fraud and imposition. I shall therefore pronounce against the will, but I shall give no costs.”

I have looked into the original papers in *Middleton v. Forbes*; and

the deposition of Collins—the only surviving attesting witness—was to the following effect:—“He is an auctioneer—he and his father were employed on the death of William Wilcox, about his funeral. The transaction of which he is about to depose, took place at his (William Wilcox’s) house about a fortnight after the death. From a conversation between the deceased, Middleton and witness’ father, he understood the will was ready for execution: the deceased expressed a desire then to sign it, and desired deponent to fetch a third witness, his uncle. The will was read in the presence of all three—the deceased was attentive—expressed full approbation—took a pen and signed his name, and published the paper as his will.” The witness speaks to his full belief of his capacity—says “that the deceased was a wary man—perfectly sober—and expressed great obligations to the Middletons (a)—though the deceased was not acquainted with the nature and full extent of the property of which he was become possessed—yet he thought it considerable.” This is the substance of Collins’s deposition; and from my note of the sentence, the Learned Judge did not seem to think this witness discredited, yet on the whole case he was of opinion that the will was not satisfactorily proved.

The circumstances differ in many respects from the present; for no two cases of circumstances agree exactly: yet the principles deducible from it confirm those laid down in *Paske v. Ollat*. This case shows where such grounds of suspicion exist, the evidence must be clear and decisive:—it shows that it is not necessary to prove fraud and imposition; for the Judge gave no costs, so that fraud was not proved, yet he pronounced against the will; it shows also, that though the parties may stand in a suspicious relation, and though there may be suspicious conduct, and some deficiency of capacity, yet satisfactory evidence of the *factum* may establish the instrument—that the instrument is not in law invalid.

Secondly, then applying and governed by these principles, I proposed to examine what was the state of capacity: for if the capacity was quite perfect, and the deceased in no degree exposed to circumvention, he would take care not to put his hand to an instrument and publish it as his will, without fully knowing its nature and import, and approving its contents.

It was not denied in argument—that the deceased, to a certain extent, was possessed of capacity, which with clear proof, might give effect to a testamentary instrument;—that if the attesting witnesses could have spoken to instructions given by the deceased himself; to circumstances and conduct, clearly and distinctly manifesting intention and volition, and that he fully comprehended the nature of the act, and evinced a voluntary wish and desire so to dispose of his property—there was nothing in the evidence of incapacity sufficient to falsify such a case.

The deceased was not insane; nor was he an idiot: he had a certain degree of eccentricity; but no delusion: he had a certain degree of weakness of understanding, that exposed him to imposition; but not that degree of imbecility which rendered him intestable. This is the sort of case set up in argument, and upon which the Court has to decide. It becomes important, therefore, for me to consider carefully what is

(a) It appeared that the Middletons were distant relations, and that one of them paid the deceased his weekly allowance before the death of William Wilcox, the cousin.

meant by "imbecility of mind"—what are its marks and characters—and what are its effects and bearings in deciding upon the validity of a will.

In order to arrive at the true meaning of "imbecility of mind," we may resort to what the law describes perfect capacity, which is most correctly found in the form of our pleadings. The averment to be contained in a common *condidit* is, that the testator was "of sound mind, memory, and understanding—talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment, and reflection." Here is the legal standard. When all this can be truly predicated of the person, bare execution is sufficient: but if it cannot be truly predicated, a deficiency of capacity exists—a deficiency not necessarily rendering the person intestable, but in proportion to the degree of deficiency, requiring clearer and more direct proof of the unbiassed testamentary intention. Imbecility, and weakness of mind, may exist in different degrees between the limits of absolute idiotcy on the one hand, and of perfect capacity on the other. When the Law uses the terms, "mind, memory, understanding,—thought, judgment, reflection," it must not be supposed that they are quite synonymous; that each means precisely the same thing. By no means: they are separate faculties, though nearly connected with and graduating into each other; and one or more of these faculties may be defective in a greater or less degree, while the others remain perfect in the same individual.

Locke speaking of idiots, says, "Those who cannot distinguish, compare, and abstract, would hardly be able to judge or reason to any tolerable degree, but only a little and imperfectly, about things present and very familiar to their senses; and indeed any of the forementioned faculties, if wanting or out of order, produce suitable effects in men's understandings and knowledge." "In fine, the defect in Naturals seems to proceed from want of quickness, activity, and motion, in the intellectual faculties." (a)

In confirmation of this doctrine, we find (and I state it from observation, from examples, and from high medical authorities which have lately come under my notice) (b) different faculties failing in different persons. For example—the memory is sometimes perfect where higher powers of the understanding are greatly defective. When imbecility is original or, as medical authorities express it, connate; the memory is often perfect, especially of trifling and simple circumstances, though the other mental powers remain infantine, or, as the same authorities suppose and express it, "The brain has never developed itself." In such an individual, the understanding has made little progress with years—it has not matured and ripened in the usual manner: yet, even in such individuals, unless the imbecility be extreme, some improvement will have taken place—some progress in knowledge beyond mere infancy will have been made—by the help of memory—by imitation—by habit—such an individual will acquire many ideas—will recollect facts and circumstances and places, and hacknied quotations from books—will conduct himself orderly and mannerly—will make a few rational remarks on familiar and trite subjects—may retain self dominion and spend his

(a) Essay on the Human Understanding, B. II. c. 12. ss. 12, 13.

(b) The Court was understood to allude to the depositions of the Physicians in the Portsmouth cause.

own little income in providing for his wants, as a boy spends his pocket-money—and yet may labour under great infirmity of mind and be very liable to fraud and imposition.

The principal marks and features of imbecility are the same which belong to childhood—of course (as already observed) varying in degree in different individuals;—Frivolous pursuits—fondness for and stress upon trifles—inertness of mind—paucity of ideas—shyness—timidity—submission to control—acquiescence under influence—and the like. Hence these infantine qualities have acquired for this species of deficiency of understanding, the name of “childishness.” The effect is, that where imbecility exists at all, and in proportion to its degree, it becomes necessary, especially in a case exposed to other adverse presumptions, to ascertain its extent with some accuracy; to see how far the individual was liable to be controlled by influence—to submit to ascendancy—to acquiesce from inertness and confidence in those acts, upon the validity of which the Court has to decide.

The character of the deceased, and of his mind, is spoken to by a vast number of witnesses—though it is perhaps more accurately and satisfactorily to be collected from the documents, and from his conduct, and, in no inconsiderable degree, from obvious acts which he omitted to do; and I shall have occasion to examine whether there was not latterly one character of imbecility more particularly exposing him to imposition—namely, inertness and indolence of mind, or as Mr. Locke has expressed it, “want of activity and motion in the intellectual faculties.”

There are several witnesses examined to the character and capacity of the deceased, going back many years, to a time when he resided at the Black Lion, Water Lane—at the Cecil Coffee House—at the Russell Coffee House—and at other places:—they give a strange and not a very precise account of him;—some think him foolish;—others out of his mind—qualities, however, not wholly irreconcilable: they describe him as—filthy in his bed-room—disgusting at his meals—entertaining a dislike to women—insulting people in the streets—hallooed after by the boys—abusing people for coughing—singing out “Yehep, Yehep.” Some of these peculiarities may possibly be highly coloured and exaggerated: but even these witnesses do not make out a case of absolute incapacity, nor show that he was wholly intestable, though they tend to lower him considerably beneath the standard of perfect understanding; and as the question does not turn upon the total absence but upon the degree of capacity, the evidence of these witnesses need not be stated at length, for they contribute but little to fix that point, and the facts themselves to which they depose are remote. The more material part to be examined, is the state of the deceased at and about the time of his brother’s death, and from thence to the execution of the codicil.

At the time of his brother’s death, the deceased, as I have said, was lodging at Mead’s, the engraver’s. Now, to this part of his history, a witness has been examined, whose evidence has been much observed upon by both sides—Mrs. Barbara Ingram, a legatee under this will in the sum of £4,000—she is produced in opposition to the papers, and is in point of law deposing directly against her own interest; she declares upon oath that she has received no promise, and has no expectation of indemnity, if the will should be set aside. It is suggested, that she may expect to be rewarded by Mrs. Ingram, the party, who will have

ample means of so doing: that is possible, but it is mere conjecture, and she denies it: she is very distantly related, being a second cousin once removed, and there are several other relations in the same degree; and it is also rather hinted that other persons—Mr. Severne and his family, are the most probable objects of Mrs. Ingram's testamentary favour. The fact however is, that she is deposing directly against her interest; for she will gain nothing by an intestacy, and will lose her legacy of £4,000. She may have some bias on her mind—arising from friendship and regard for Mrs. Ingram, and still more from what she may conceive to be the justice of the case—which would induce the Court to look at her evidence with caution: but still she appears to have deposed according to her sincere impression of the truth, and she has had considerable opportunities of forming a judgment of the character of the deceased, and particularly about the most important period. On the second article she thus deposes:

“Deponent (Barbara Ingram) first saw the deceased at Kensington about thirty-five years before his death; he called occasionally at deponent's aunts, Mary and Ann Ingram, with whom deponent resided from her childhood. The deceased came perhaps once a week for a week or two together, then absented himself for months, perhaps a twelvemonth together, without ever accounting for his absence.” [This conduct is odd and eccentric.] “Deponent left London in 1792: she saw the deceased again in 1802, when he called at Kensington upon his sister. Deponent left London in 1806, and did not see him again till the death of his brother, when she called at Mead's.” [The more material period follows.] “From that time she called about once in a month or six weeks for the satisfaction of his sister—not at her request—she so called at his lodgings at Carolan's, and staid ten minutes or a quarter of an hour. She continued so to do till about the time deceased went to live at Wyatt's. The deponent considers deceased to have been decidedly imbecile in mind as long as she knew him—wholly incapable of the management of any business of importance. His conversation marked extreme imbecility.” [It is clear from the context that the deponent means weakness—not absolute idiotcy.] “He rarely conversed upon any subjects than what articles of food were palatable or unpalatable; about the east wind being injurious to health—he had a particular aversion to the east wind, so that deponent rarely saw him that he did not so speak of it. When deponent called upon him at Carolan's, after he had asked about his sister, the state of her health, and her eyes, he seldom spoke of any thing but the game he had from Wyatt's, and such like trivial subjects. His manners were eccentric and offensive—perhaps more disagreeable than eccentric—spitting on the carpet and rubbing it over with his foot. He was extremely reserved; shy beyond any thing; but she does not consider that as at all accounting for any apparent weakness of intellect, for he was exceedingly frivolous; and said the same sort of things over and over again—not in the course of the same visit, but on each succeeding visit it was a repetition of the same trifling remarks on the same frivolous subjects as the preceding. He did not talk irrationally: it was not derangement, but feebleness of understanding that he manifested, and *that* he did uniformly. The deceased also appeared to be of a remarkably indolent, sluggish disposition—extremely averse to taking the least trouble in any way about any thing. He spoke, for instance, of his aversion to writing: he always desired deponent to give

His kind regards to his sister, but excused himself from writing to her, because he said he disliked it. His dress was slovenly, and his whole appearance and manner were those of a person extremely supine and averse to the slightest exertion. He was personally civil to deponent: he came down to her, and attended her to the house door; but his manner was that of extreme indolence both natural and habitual. He latterly complained very much of his eyesight—he was always extremely shortsighted. He was very deaf *latterly*, so that to make herself heard she was obliged to raise her voice considerably. He might be equal to ordering what he liked best for dinner, and to the payment of little current expenses, but she believes him to have been unequal to the management of any thing—incapable thereof from his extreme feebleness of intellect.”—That is, however, only matter of opinion.

To the 7th article she says—“She once saw young Wyatt at the deceased’s lodgings in Great Queen Street; and afterwards heard him mention Wyatt as having sent him some game, but in terms of displeasure for leaving him to pay the carriage of it: this he did on more than one occasion. All she ever heard the deceased say of any property that had come to him by his brother’s death was, that it had come too late for him to enjoy it; that if it had come some years sooner he might have had some enjoyment from it.”

If this description be tolerably correct, it shows considerable weakness of mind, and exhibits a character much exposed to fraud and imposition. It will be seen how far this portrait of the deceased is confirmed as to its likeness. Some of these traits are spoken to by the witnesses on both sides—his eccentric manner—his dirty habits—his shyness and reserve—his penuriousness. Mead, though the deceased had lodged there two years, would not suffer him to dine with his family, but sent him cold meat up to his room—even Carolan, his great friend upon whom he has heaped acts of bounty, pursued the same course—at first (according to Orlton) the deceased was allowed to dine in the parlour, but he was so disagreeable that he was sent up stairs—after a time he was tried again and was re-admitted into the parlour, but he was again banished to his own two pair of stairs room, and this witness is in some degree corroborated by the fact of the deceased having applied to return to Mead’s, and being refused. His penuriousness, almost to a morbid extent, is acknowledged by some of Wyatt’s own witnesses, who yet speak very strongly to their opinion of his capacity—for instance, Fountain, the owner of the Marquis of Granby public-house, and who supplied the deceased with wine, gives this account:

“The deceased was in deponent’s judgment a well informed man, and could be amusing in the way of anecdote.” [This is proof of memory.] “He was a very shy man—there were few people to whom he would talk. He quoted Shakspeare, and could repeat a great portion of several of the plays—he had evidently a good memory. He did at all times conduct himself as a sensible rational person: the only thing remarkable was the difficulty of getting money from him—he was unwilling to pay money at any time: he would allow an account to run up to three or four pounds, and then it was with difficulty that one or two was got from him. The account was delivered to him once every week, and deponent has known him, after looking at it, say he was charged for more than he had; but that was because he was unwilling to part with money: he appeared to be very penurious, but in no re-

spect incapable of the management of himself and his affairs.”—That is, his own little income.

To the 9th interrogatory he answers—“The deceased was rather singular in his appearance; a little old spare man; very near-sighted and shy; very reserved generally. He was dirty in his appearance and habits—unpleasantly so undoubtedly, but he knew what good company was, and could behave as correctly as any man.” To the 12th—“He was unwilling to pay. When respondent represented to him that it was not customary to give credit for such small articles, it was still difficult to get the money from him, and then only a part at a time. There was part of his account unpaid when deceased left Carolan’s house.”

Here then, though for the last three years he was in the receipt of an annual income of £2000, he will not settle a little tavern account of a few shillings, but leaves London without paying it. Thus he was either very penurious, or else he did not comprehend that he had the use and command of this property acquired by his brother’s intestacy. The witness thinks, because he was scrupulous in these petty matters, and able, in this feeble manner, to manage his own little income, that he was of course adequate to the transaction of business of consequence, and competent to regulate and understand more weighty affairs;—the important consideration will be how far he was able to, and did really, comprehend his new concerns so as not to be liable to imposition.

Of his general capacity, an account very similar to Fountain’s is given of him after he leaves London in 1822, and goes to Clopton House: he there resides with Mr. Henry Wyatt and his family, is occasionally driven out in his gig, dines at his table, in company with Wyatt’s professional and sporting friends, before whom he would naturally be on his good behaviour, and, after his shyness and reserve were worn off, would occasionally join a little in conversation, would talk of places he had been at, quote little hacknied passages from Shakspeare, and other authors, which in the course of a long life he had picked up and recollected; and from these and the like circumstances, witnesses might draw an inference, and form an opinion that he was a person of perfect mind. This evidence, given by six or seven gentlemen of station, might, in some cases, be of importance; and if the question were whether the deceased was sane or insane, whether there was such a degree of infirmity of mind as should shake the credit of witnesses deposing to full instructions and testamentary intention, it would be evidence of great weight as collateral support of such witnesses, and in opposition to testimony of total incapacity: but in a case like the present, turning on the degree of capacity from which, without evidence of instructions, and under circumstances of suspicion, full comprehension of the act and testamentary intention are to be inferred, the general statement and opinion of these persons, who speak to the deceased’s condition at Clopton, bear with less force on the true point of the case. An old man of seventy-two, very short-sighted, rather deaf, enjoying the comforts of Mr. Wyatt’s table, (to which it appears by other parts of the evidence he was by no means insensible)—excited by the society and civilities of Mr. Wyatt’s friends—might say and do all which these witnesses attribute to the testator, and yet might possess an extremely slender, feeble, inert mind, acquiescent in and impressed by any thing which Henry Wyatt proposed or suggested—and might have no sufficient comprehension of the nature and effect of a testamentary instrument

which he might subscribe. Those witnesses indeed who speak to recognitions must be distinctly considered; but the exact degree of capacity attributable to the deceased, and whether it comes up to the exigencies of this cause, must rather be decided on other parts of the evidence, than on the testimony of the witnesses at Clopton House.

First, here are several letters written by the deceased's brother, Edward, which certainly show that the deceased was not considered as an idiot, incapable of expressing an assent to, or dissent from, the sale of the Chetwode estate—nay, when his mind was brought to the consideration, he could make a rational observation respecting it, such as that it was adviseable to sell as prices were high, or, as he expresses it, “to make hay while the sun shines,” and the like; but the correspondence ends without any final answer being obtained from him: he could never be fixed to any decision. This then proves no more than that he was held not disqualified to do a legal act binding his property, or, as is admitted, that he had a testable capacity.

The next set of exhibits, is the rental and observations on the Clopton estate, made in 1800 by Edward Clopton and sent to his sister Barbara; and, in 1818, on the death of the elder brother, forwarded by the sister to the deceased and endorsed by her “for the information of my brother John Ingram.” These, again, only show that Mrs. Barbara Ingram did at that time consider that the deceased was not incapable of understanding such documents, if he applied his mind to the subject; or at all events that it was her duty to place these papers in his hands; but she had not seen him for many years.

I come, thirdly, to the deceased's own letters, and they are of great importance: they establish testamentary capacity to a certain extent beyond all doubt; nay, that he was aware, in some degree, of his rights, and capable of comprehending some matters respecting his property, or at least, respecting some parts of it. His letter written immediately upon hearing of his brother's death to Mr. Grantham, the tenant of the Chetwode estate, is exhibited, and is in these terms:—

“SIR,

“My Brother having departed this life, the whole rent of the estate of Course comes to me, so you may pay it in to the Banker in Fleet Street, with a draft for me to receive it, or to Mrs. B. Ingram at Thenford, My Brother Dying without leaveing a will, it is not yet known what other property he has left You will I hope leave me have it soon, as you are much behind hand in your payments, and I am at present out of Cash, do not forget to prevent my writeing again.

Your most humble servant,

“London, May 29<sup>th</sup>

J INGRAM.”

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This letter carries at first sight more weight with it than it is entitled to, when coupled with the other letters. It relates only to the Chetwode estate, which he had long held jointly with his brother; and it shows he was aware that the other moiety of that estate devolved of course on him by his brother's death. But it is to be remembered that he had been in correspondence respecting the sale of that property, and that it was an object with which his mind, however dull and sluggish, had long been familiarized. In this very letter there are symptoms of very limited faculties—“The rent is to be sent as usual either to his

Banker in Fleet Street or Mrs. Barbara Ingram at Thenford"—not to him or his own bankers, Martin and Company—that change of place does not occur to his mind—no such “thought or reflection” originates with him—he is “anxious for this cash”—but does not seem aware that the Clopton estate had descended to him, which was nearly of ten times the value of the other: Chetwode therefore was now become comparatively a trifling object, yet it alone is mentioned by the deceased. Grantham comes to town and calls upon him at Mead’s, and says, he made rational enquiries and held rational conversation about this Chetwode property—to that extent his attention is excited—he comprehends and understands, and is alive to, what relates to this little estate. So Mrs. Barbara Ingram deposes, “all she ever heard him say about his brother’s property was that it had come too late for him to enjoy it”—not entering however into any particulars which show his apprehension of the extent of the addition: he might still only allude to Chetwode.

The next exhibit is the bond on taking administration to his brother. The fact of taking administration and executing this bond under the circumstances go but a little way to demonstrate the extent of his capacity. Here were Severne, acting for the sister, and Wyatt, the old agent of the estates, with the deceased;—He was old—rather deaf—nearly blind—not in the habit of business;—the active part would naturally devolve on Wyatt and Severne—the merely formal part on the deceased: it proves that he was not an idiot, who could not be exhibited, and go through the forms of executing such an instrument and of transferring the property under an administration, in the presence and under the direction of friends; but the mere circumstance of having gone through the forms of such business when accompanied by Wyatt and Severne, affords but very slender proof of his activity and apprehension in managing and transacting business. To give greater effect to this occurrence, no evidence on the part of the executor has been offered of any sort—no person has been produced to show that he took a prominent part in the business—or gave directions or assistance respecting it—he does not say any thing to Mead that he was going to transact, or had been transacting any such business. He makes no reference to it, nor has any conversation, as from himself, with his bankers. At his bankers, however, the arrangement already noticed was made, viz. that Wyatt should receive the rents of the estate and remit them to the bankers, who, when their balance exceeded £500, were to purchase stock. This arrangement (as has been argued) carries with it inferences of the deceased’s weakness of mind and inaptitude for business, and that it was necessary to act for him by a sort of guardianship:—he was living in London—he might therefore from time to time have given his own directions—if he chose the remittances to be made to the bankers, he might have desired to be advised of such remittances by his agent—he might have enquired at his bankers of the state of his balance—he might have had a banker’s book—he would naturally have done all this or something of the kind if he were in the management of his own concerns;—but there is not a tittle of evidence in explanation; nothing to prove that the arrangement originated with the deceased, or was discussed or approved by him with intelligence or understanding. After this arrangement is made there is no letter to show that Mr. Wyatt ever advised her of any remittance, or acted as if he considered the deceased had the least knowledge or comprehension of these matters. All

that Wyatt does (so far as appears) is in June 1820—at the end of two years—to pass a sort of account with the deceased, in which the remittances are lumped—£550, in one year—£1690, in the other. The account is signed by the deceased—no voucher is referred to, nor, as far as appears, produced—nor is there even a date to any one item of receipt or expenditure. There is no banker's book, nor is there any thing to show that the deceased ever makes a single enquiry whether the money was remitted or whether the surplus was laid out.—The only time the banker's book is made up is in 1821, just when the will was signed—it is then copied out *uno contextu* from the banker's ledger—the stock receipts and four drafts are stuffed into the pocket. It was found in his box at Carolan's after his death; but that there was any prior account from his bankers, or any subsequent account—though he remained a year longer in London—there is not the slightest trace during the whole period from 1818 to 1822. The fact itself—the conduct of the parties—the conduct of the deceased—bespeak so strongly his inertness, his indolence, his inactivity, his acquiescence, that it does not require the evidence of Mr. Severne to confirm that view of it:—it does not however prove want of testible capacity, if properly put in motion and called forth. If, in this arrangement, it could be shown that it originated with the deceased—that he had proposed it as saving him trouble—that he had even upon discussion and consideration and the assignment of proper reasons agreed, or even, if afterwards, he had been active in executing this arrangement and in carrying it into operation, the unfavourable impression produced by it might have been taken off—it might possibly have told in favour of capacity—but the only evidence produced is quite the other way. Mr. Severne deposes that the deceased was a mere cipher throughout the whole business. Mr. Severne is undoubtedly a strong partizan—he has the management of the cause—he is therefore a biassed and prejudiced witness, to be heard with caution, particularly in matters of opinion and inference—but looking at his whole evidence, I see no reason to disbelieve him on matters of fact. But upon this part of the case the facts speak for themselves, and demonstrate that the deceased was not so active and alive to concerns of importance as to be in no degree in danger of circumvention and influence. He is by this arrangement treated as a child—as a person whose affairs were necessarily to be conducted for him; and his own subsequent inactivity respecting it confirms the character of inertness and indolence described by Mrs. Barbara Ingram.

The next occurrence in order of time is the change of name. Upon that occasion Mr. Gregory (the partner of Mr. Adlington) had some slight intercourse with him—I say slight, because he deposes that he understood the business had been arranged with Mr. Wyatt;—the expenses were paid by Mr. Wyatt and are charged in his accounts: the deceased, therefore, had only to go through the formal parts under the guidance of Mr. Gregory, who once also attended him to the Accountant General's office to identify him, in order that he might receive a sum of money. On these two occasions he appeared to understand the business and conducted himself as a rational person. These transactions are so slight that they are of no great effect in fixing the extent of the deceased's mental powers, nor in ascertaining whether he was so far alive to his interests as to be in no danger of imposition.

To return, however, to the deceased's own letters, which certainly

constitute the strongest part of the case in support of the general capacity. Letter "I" is dated the 20th of December 1818, and is addressed to Mr. Wyatt:—

"SIR,

"This is to inform you, there has been a Letter sent to me at my former Lodgings, which I have long ago left, as you might not know this, I did suppose it was from you or my Bucks Tenant, which I should be glad to know, it was of course taken back to the Post Office, not finding me, my Address at present is at No. 94 Charlotte Street Rathbone place, where you direct in future and let Mr. Grantam know soon as you see him, Illness prevented my coming down as intended, but I mean it soon to spend the remainder of my days as I am quite tired of the Town, dont forget about raising the rent of the Bucks estate, as it ought to have been done long before this time, I shall expect to hear soon from you, and what Money you have paid in on my account—I am your Humble Servant,

"J. INGRAM."

Here again, the Buckinghamshire estate—Chetwode—is the burden of the song—not a word about Clopton—nor about the remittances to his bankers; for "paid in on my account" might have referred to the Chetwode rent, which was to be paid in Fleet Street or to his sister. It might certainly have some relation to the arrangement—but so little active and alive was he to his own concerns and business that he had not even sent his address, though he had changed his lodgings from Mead's to Carolan's six months before.

Letter "K," annexed to Wyatt's general interrogatories, is pretty much of the same character: it is dated January 6th 1819; and addressed to Mr. Wyatt:—

"DEAR SIR,

"I have received your long Letter; but you make no mention whether Grantham has paid his rent, which has been due, long before this time, when I was last at Martins with you I signed some paper, what it was I know not, perhaps that be a power of Attorney for him to receive my new Dividend, I have not been there since, I mean to call soon, as also upon your Agent as you wish me you will settle matters with the Bucks Tenant, that may be the means of making the estate more valuable is what I wish, or else sell it, if a good purchaser is to be found, I suppose you come to Town in the Winter if you do shall be glad to see you, Mr. Severn has called twice, I have no more to say at present.

"J. CLOPTON."

Here is the same harping on the Buckinghamshire tenant. Here is evidence that he had not been at his bankers for six months, and that he did not know what he had signed—"I signed some paper, what it was I know not"—this is strong proof of great inertness and weakness of mind, not amounting to absolute idiotcy, but rendering him liable to be much imposed on: it looks as if he would sign any thing which a person in whom he had confidence would place before him. The other letters go on very much in the same form: the next is dated on the 13th of January:

"DEAR SIR,

"I have received the Game you sent up, but prefer any thing in the poultry way such as Capons or Ducks which I will be obliged to you to send as soon as possible a Brace of Each, should they not be to be had send any thing you can catch, Pidgeons or wild rabbits, but nothing stalled fed, by which you will much oblige your very Humble Servant,

"J. CLOPTON."

"L" is a letter addressed to Henry Wyatt:

"MY DEAR SIR,

"I have been favord with your obliging Letter, and inform you I shall continue in Town till your Father comes to settle the business with regard to the stamp office and when that is done I mean to pay a visit to Stratford—I am not quite so well in health as I could wish, but perhaps the country air may mend me, I do not know what Cash has been paid into the Bankers, but I find the Bucks Tennant, much behind Hand, he must looked after being a Farmer who thinks of no bodys wants but their own, I shall be very glad to leave London, having been so long confined in it, and the noise and bustle does not at all agree with me, I like the Town of Stratford much as the roads about it are good, I can divide my time between it and Warwick, perhaps take a peep of Leamington spa which I hear is increasing very fast in Building but it being a public place I should not continue long there I have no more to add at present, but remain your most obedient Humble Servant,

"J. CLOPTON."

"London June 1st—19."

There is nothing in this letter sounding to folly, nor on the other hand—which is most material—any thing to show a capacity for managing or comprehending his situation and property, nor to prove that he had turned his attention to them. All, in that respect, relates to the Buckinghamshire tenant alone. It is a trifling letter, such as a schoolboy would write. He talks of leaving London and of going into the country: it indicates that degree of intellect which renders him neither idiot nor lunatic, but it does not manifest that knowledge of the world and of business which would guard him against circumvention.

"M" is addressed to Mr. Wyatt:

"DEAR SIR,

"Your stay in town was so very short, I had not time to make mention of all I wished to say, you know very well I have had none of Grantham's rent since you paid me last, and is now a year, I want to know, if he has paid in any since that time, and whenever he does in future you will be so good as to let me know, you paid me one half years rent at my old lodgings, last summer, none have I had to this time, when I call at the Bankers I inquire if any of the Bucks rent is paid separate from any other stock, so you will let me know when any is paid in, and I shall know when I call, here has been nothing but foul weather since you left Town, I mean to be down soon as possible pray remember me to all your Family, I am yours,

"J. CLOPTON."

"London June 29th—19."

This again is still confined to the Buckinghamshire tenant—his mind cannot get beyond that. If he had inquired at the Bankers he would have learnt that 700*l.* or 800*l.* had been remitted to them, in addition to the dividends received on the stock, and he might have got any money he wanted.

“N” is in these terms:

“DEAR SIR,

“I am sorry I have not been able to come down to Stratford, according to my promise, owing to ill health, I did not think it safe to Travell alone, but I made every preparation for coming down, to stay allways as I should not like to have my Bones laid in London when I depart this Life, the Bucks rent you must remit to me or pay it in to the Banker, as by this time there will be another half year Due, I have received the game you sent last, which were very good, I only wait for a Companion, going the same way, and I have met with one, who goes by the Birmingham six Clock Coach and stops at the White Lion about Eight to Breakfast, this is the conveyance, I mean to come by, sooner or later, I shall add nothing more at present, only to say, I am at this time at the same No 94 Charlotte Street Fitzroy Square.

“Your most Obedient Servant,

“London Oct. 29th—19.”

“J. CLOPTON.

“N 1.” is also to Mr. Wyatt:

“DEAR SIR,

“I have received both your letters, and you are here informed I give my consent to your filling up the place of the old Tennant, I am sorry to hear of your son’s illness, but this winter has been so severe as to affect all ages, the Game he sent, I had safe, but wondered to find the conveyance not paid, as always has been before, so that in future, it must come carriage paid, I have not yet been after the Chancery Money, but will stay till you come to Town, I shall add no more at present, as writing is very troublesome to me, so remain your H St

“London Feby 23d

J. CLOPTON”

20.

This letter confirms Mrs. Barbara Ingram’s evidence, that he was angry game was sent to him without the carriage being paid, and shows that he was not aware that if paid at Stratford it would form an item in his Agent’s account.

“O” is addressed to Henry Wyatt:

“DEAR SIR,

“I have received the papers with your letter inclosed, and will take care, what you mention shall be done, I should have seen you before now, had it not been for the badness of the weather for the very day I had fixed for my departure, which was Monday week, turned out a complete wet one, and it has not been settled weather since, I mean to come yet, for I think September the pleasantest Month in year for Travel, if you remember, I told you when you was last in Town, I would not have you send up any Game, till it is wrote for, as I have no convenience of cooking it, if I come down I shall spend all this year with you, but you shall hear further from me, should I wish you to come and fetch me, but

do not send any Game at present remember me to all your Family, I remain Sr Your most H, Servant

“London August 30h—20

JOHN CLOPTON”

This letter raises the standard of his intellects no higher.

Letter “P” is written to Mr. Wyatt:

“DEAR SIR,

“Perhaps you will think it strange, you have not received your papers yet, but I must beg leave to inform you I cannot chuse to put my signature to them, as I pay enough to Government, as it is, if I employ Gamekeepers, my outgoings will be so much the more, and I do not receive any benefit by it, if I lived at the estate, it then would be proper, as to what others have done before me, is no rule for me to go by, I have seen Mr. Severn, who came up to Town in a great hurry owing to the death of a relation I meant to have been down before now, but I have been very unwell, and the weather has been very cold and changen, it may happen that I may come yet, should I not, I will send you the packet, but I do not mean to put my name to them, my Compliments to all your Familly

“I am Sr your very Obedient Hbe St  
J CLOPTON”

“London Octr 3 20.

Exhibit “Q” is addressed to Henry Wyatt:

“DEAR SIR,

“It is now a long time since I last heard from you, wherein you made mention, as to the incroachments made on my estate, which you might be assured I should give a negative to, as I consider it no better than a robbery, but as you have the management of the Estate, I did suppose you would settle it to my advantage, I thought you would have been in Town, before now, as I wished to see you, I will come down as soon as I can, but I have been very poorly of lately, we have had a deal of cold weather in Town, but I hope it will soon change for the better, I shall add no more at present, only to remind you about paying in the rent, to the Banking House

“I am Sr Your very HSt  
JOHN CLOPTON”

“London June 26 21

“Q.” 1. is the last of this collection of letters, and is addressed to Henry Wyatt:

“DEAR SIR,

“I return you thanks for your obliging letter, but tell your wife, never to send me a Goose in future, as it is what I dislike, any other will do, but that she could not tell, my pallet, I had none of it, I gave it to Mr. C” [Mr. Carolan I suppose] “and his wife who like it, You give an account of your journey, I did not suppose you would like that Country long, there has been nothing but wet Weather in Town since I saw you last, you mentioned about coming up Ocr or November, which if you do, there will be no occasion to come on purpose for me, unless you chuse it, give my Compliments to your wife, and say I shall be glad to accept of any thing but Goose, I think you would like South Wales, but north is too much of mountain, tho the mutton is much finer.

“I am Sr your very H St  
J CLOPTON”

“London Octr 4—21

This shows frivolity of mind, that he was fond of eating and considered it of great importance. It begins with the goose and ends with the goose.

These exhibits, though they negative idiotcy, or total incapacity—though they prove he was testable, provided it were shown that in doing the act he really wished to dispose of his property, and clearly apprehended and understood what he was doing; yet they do not establish that complete understanding and perfect capacity, that a mere bare act of execution shall infer full knowledge of the nature and contents, under such circumstances that the Court must require to be satisfied that no imposition was practised.

Two matters which would have been of the highest importance to the executor I have in vain looked for in these letters.—First; some active attention to this great property which the deceased had acquired by his brother's death, or even some knowledge of its nature and extent and of his rights regarding it—but scarcely a reference to it is to be found: Secondly, some trace of an intention to give this property to Henry Wyatt—or even of affection and particular regard and partiality for him, so as to render the existence of such a purpose in the deceased's mind probable; but there is nothing going to either point.

On the other hand, when I consider what obvious and natural acts are omitted to be done—there is no one matter of business, wherein he was engaged, that he takes such a part as indicates his ability to manage his concerns. I have already noticed the arrangement at the Bankers—in which he appears a perfect cypher—a mere instrument;—and have remarked on his subsequent inactivity in respect to that arrangement:—further, he takes no share in the management or conduct of the Clopton estate—even after he goes down to Clopton he pays no attention to it—he takes no view of it—he makes no inquiries about it—he never asks whether the farms are advantageously let?—whether there are good tenants?—who have paid their rents—or who are in arrear?

As little did he look after and manage his personal property while resident in London—he never informed himself whether the remittances were regularly paid by his agent—whether the dividends were duly received—whether the surplus was properly laid out?—he draws for his £36 half yearly just as before his brother's death—but as far as his acts and conduct go there is no one circumstance to establish that he was aware he had the right and power of using that great addition to his fortune—the remaining portion of Chetwode is the only part of which (so far as appears) he had any notion: he goes on as before in his lodgings at 8 shillings per week, haggling and disputing about paying for his weekly supplies at the tavern;—discharging that account, bit by bit;—and going out of town in 1822 leaving part of Fountain's bill—a pound or two—unpaid. From some frivolous obstacle or other, he is four years making up his mind to go down to Stratford; the *vis inertiae* was strong, but at last with great difficulty he induces himself to leave London.

The result of the evidence upon this head of capacity is, that he was a very weak man;—that judging both from what he did, and from what he omitted to do—his understanding was much below par, and the legal standard of perfect capacity;—that Inertness, Inactivity, Indolence, Torpidity of mind, Inattention to his large property, were the leading characteristics and symptoms of his weakness;—

that he was therefore (to take it no higher,) a person so far liable to be imposed upon as to require the Court to look with vigilance and jealousy into the proofs of the *factum*;—that he might possess a testable capacity;—and that very strong and clear evidence of the *factum* and of free and active testamentary intention might establish the executor's case.

Is there such evidence?

First, is there any thing to lead up to the intention of making this disposition of his property? On the one side it is said that it is a probable disposition; while on the other it is as strongly maintained that it is an improbable disposition. In cases where there is any doubt of capacity or any suspicion of fraud, evidence of affection and testamentary declarations are generally adduced to prepare the mind of the Court, and to conduct as it were to the testamentary act. It was argued—that the sister was far advanced in life and was already amply provided for,—that he thought himself ill used by his relations—and that it was not extraordinary he should take a liking to this young man and give him his fortune. And certainly in that statement there is nothing improbable if there were any proof of it:—but on the other hand, his sister was not his only relation; his cousin, Mrs. Mary Ingram was living when these instructions were made—she did not die till the 14th of December 1824—she outlived the deceased (Henry Wyatt's letter on the death of the deceased is addressed to her) and under her will Mrs. Barbara Ingram acquired a considerable addition to her fortune and was one of her executors. The present will therefore not only cuts off his sister, but excludes his cousins and his whole family, and adopts a stranger in blood against the ordinary presumption of law, which favours those allied by kindred. In respect to complaints against his relations: it is true that he and his brother do not seem to have been upon terms of much cordiality or kindness—they were joint residuary legatees of their father—but the deceased had dissipated all his share over which he had any power, and might be angry with his brother for not affording him the means of indulging in his extravagance and eccentricities; but from his sister he did receive assistance even beyond her limited funds—through her he was furnished with supplies from his brother, who concealed from the deceased that the relief came from him—and as far as the deceased was capable of affection, he did to the last of his residence in London make kind enquiries after his sister and send his kind regards to her: there is no trace of disaffection towards her before the will was made: he might, it is true, from some fancy or caprice take a liking to Henry Wyatt and adopt him as a son; but where is the proof of it, previous to, and in aid of these acts? If, in conversation with his bankers or with Mr. Gregory or with Mr. Fountain or with any other person, he had made frequent declarations to this effect, they might be important; but there is not a hint of the sort: there is no expression of affection for Henry Wyatt—no declaration of any kind, by word or by letter, even as to making a will disposing of his property at all—much less in favour of Wyatt. On the other hand here is not a mere declaration, but a formal act in his own handwriting and attested, quite negating any such intention up to a date long subsequent to his brother's death. I refer to that which has been denominated “the will of interment.” It is rather a strange act, strangely expressed, but not unsuitable to the character, weak intellects, and feelings of the deceased:

"The last Will and Testament, of John Clopton Esquire is when he departs this Life, he may be a Conveyed in a Hearse to the Town of Stratford upon Avon, in the County of Warwick, there to be interred, in the Family Vault of the Cloptons he being the last of that Family, if he be absent from his Estate, as to his property it goes of Course to the nearest kin. Witness my Hand

"January 1st, 1820.

"JOHN CLOPTON.

"Witnessed by H. Carolan

94, Charlotte St. Fitzroy Sq

"E. F. Bennett. 4 Edward St. Portman Sq."

This certainly proves that he knew what a will was—so far it is favourable to the Executor's case. Its contents, as to the place of his funeral, quite agree with passages in several of his letters—it was an object that excited and roused him to some exertion—but as to any intention at that time of adopting young Wyatt, it directly negatives it—it declares his property is to go to his nearest of kin. This was his intention in January 1820: his wishes in this respect continued to May, for in that month he delivered this instrument to Barbara Ingram with a strong expression of adherence to it:—

On the 11th and 12th articles she says—"Upon the 10th of May 1820 she called upon the deceased at Carolan's: He told her he had been wishing to see her; for he had been thinking that if he were to die in Charlotte Street they would bury him like a dog in Pancras parish; so, he said, he had made a will of interment of which he wished her to take charge! The deceased then delivered into her hands the paper writing, now shown to her, open and unsealed. Deponent told him, 'that if he had any papers of importance, she conceived that his sister as being his nearest relation was the proper person to have charge of them.' The deceased replied, 'Oh, that is only a will of interment; you will see by it that my property goes to my nearest of kin;' deponent took charge of the said writing: the deceased then gave her a strict injunction that she should see he was buried at Clopton, which she promised: and that was all that passed on that occasion."

This brings down the intentions of the deceased to the 10th of May; negating any intention of making Henry Wyatt executor, and residuary legatee.

In the next month, June 1820, Wyatt senior came to London, and the accounts for the two preceding years were passed and signed by the deceased, and by him in the manner already noticed: there is no proof of any other communication at that time, nor is it very clear that Henry Wyatt was then in town, though he possibly may have been; but he admits that between that time and the following July—a few days before the will was made—he did not see the deceased; nor is there any thing in the letters which passed, marking particular affection or intended adoption. There is consequently nothing antecedent to the will in the way of affectionate intercourse and testamentary declarations showing a previous intention and leading up to the will itself—but the "Will of interment" is quite in opposition to the papers propounded.

An intermediate act, however, of some consequence occurs demonstrating the exposed condition of the deceased and his liability to imposition, and which is not wholly unconnected with the disposition, un-

der the present will, viz.—Carolán's Paper. It is dated on the 4th December 1820, and is in these words:—

“Mr. Hugh Carolán,

“SIR,

“Fearful lest the several conversations I had with you lately should be misunderstood I think it advisable to take this method of stating to you plainly my intentions on the subject.

“I John Ingram Clopton of No. 94 Charlotte Street Rathbone Place in the parish of St. Pancras and County of Middlesex Esquire do hereby charge my personal estate with the yearly payment of *two*(a) hundred pounds to Hugh Carolán of the same place Apothecary his heirs, executors, administrators, or assigns, provided the said Hugh Carolán shall be living at the time of my decease, being in consideration for his professional and other services rendered to me for many years. And I do hereby direct my heirs, executors or administrators, previous to any other appropriation of my personal estate and effects, to make provision therefrom for the payment of the said annual sum of *Two* hundred pounds *Bank Stock* by regular quarterly payments; the first payment to be made within three months next after my decease.(b)

“December the 4th 1820

John Clopton”

Here then he subscribes, fills up and interlines a paper professing to grant a perpetual annuity to Mr. Hugh Carolán in case he survives the testator. What is the consideration? No professional or other services are established. The deceased had lodged at his house two years and a half, in a back room, up two pair of stairs at a weekly rent of eight shillings—he was at first allowed to dine in the parlour—was turned away—was admitted again—and again turned away and attempted to go back to Mead's lodgings. Who prepared it? In whose hand-writing is it? No account is given, nor does the deceased ever in any manner recognize or refer to such an act. It has been said that “this paper does not concern Henry Wyatt”—but Carolán comes with the deceased to dine at the Black Lion—Carolán is a legatee under this will for 1000*l*.—Carolán takes the deceased down to Stratford—surely if it had not been a gross imposition on the deceased, Carolán would have enabled Henry Wyatt to explain it—not being explained it affords a strong argument of the liability of the deceased to be imposed upon—it shows that he would acquiesce in, and lend his hand to fill up and to sign an instrument so highly improvident as this grant of an annuity of 200*l*. to Carolán. As to the interlineation of Bank Stock—no plausible explanation can be given to account for its weakness and absurdity—and yet, six months afterwards, this Carolán is made a legatee in the will to the amount of 1,000*l*. A considerable suspicion is thus excited that the legacy was not the act of the deceased, but was introduced into the will to secure the silence or procure the co-operation of Carolán. In both views—as showing the deceased liable to imposition, and as creating a suspicion in respect to this legacy—it adds force to the demand for clear proof of the *factum*.

(a) The words in italics are in the deceased's handwriting.

(b) This document was written on a sheet of letter paper, and bore a one pound stamp.—*Bank Stock* was interlined.

I come now to the Will itself. On the 25th of July Richard Wyatt, and on the 29th Henry Wyatt, arrive in Town. On the 31st another year's account is passed and signed; and a copy of the bankers' book is made up to that day, which, with stock receipts and cheques in the pocket, was found in his box at Carolan's: but there is not a tittle of proof that this bankers' book was prepared or procured by desire of the deceased. A day or two afterwards the preparation of the will is commenced, and on the 4th of August it is executed. In the mean time the deceased, who was penurious and fond of eating, sometimes accompanied by Carolan, regularly dines at the Black Lion with the Wyatts, except that, on one day, Henry Wyatt carries the old man up to Hampstead, and there they spend the day together. This conduct will bear two constructions; it might be in order to soothe and amuse this insulated, desolate old man—and it might arise from kindness, or from gratitude if Wyatt knew his testamentary intentions—or, on the other hand, it might be for the purpose of coaxing and nursing and influencing him, and inducing a blind confidence preparatory to the formal execution of this will on the following day—it is open to that suspicion and adds to the burthen of proof to be required. At all events, as far as that may throw light on the inquiry into the exercise or effect of undue influence, the deceased was in the possession of the Wyatts, his agents; and the transaction was as much behind the backs of any relations, who might guard and protect him against imposition, as when he was afterwards living in the little room at Clopton House with Mr. and Mrs. Wyatt.

Now then commences the most important branch of the case—the origin of the act itself—the proof of which act (from the view already taken of the history) requires to be clear and direct. There are indeed some subsequent grounds of suspicion which reflect back, upon this part of the transaction, additional reasons for examining the evidence with vigilance and for requiring strict proof.

The Court, under the circumstances already referred to, cannot accept opinions and inferences and conjectures—It must have direct testimony from witnesses above exception, speaking from undoubted recollection of facts, and it must have the facts themselves stated, so as to enable it to judge for itself, whether those facts show volition and full understanding and knowledge of the act done.

In such a case the first requisite would be instructions coming from the testator himself:—it is true, that if they cannot be proved, the defect may by possibility be remedied by something passing at the execution, tantamount to instructions—or by subsequent recognitions so clear and direct as to supply the place of instructions. In this case there are before the Court the written instructions from which the will was prepared—they are in the handwriting of Richard Wyatt the father, a quarter as unfavourable, perhaps more so—as feeling a stronger interest—than even Henry Wyatt himself. It has been said, that “Richard Wyatt was incapacitated by the state of his faculties from giving evidence—that he could not be examined—that he might have proved receiving these instructions from the deceased himself.” That is mere conjecture, which cannot compensate for proof: if the evidence is by accident defective, the misfortune, especially in such a case as the present, must fall upon the party upon whom the burden of proof lies. It has been said—the deceased was very shy,—he might prefer giving

these instructions to Richard Wyatt;—but that again is only conjecture; and ought Richard Wyatt to have accepted them?—or would he, if acting fairly? Ought he not to have represented the indelicacy of his receiving them? Would he not have forewarned the deceased of the difficulty which such a course might throw upon the proof, and the possibility that it might be the means of defeating his kind intentions? besides, the deceased had already some acquaintance with Adlington and Gregory to reconcile him to seeing one of them. If the deceased had not sense and understanding enough to agree, upon such representations and forewarnings, to give his instructions himself to the solicitor who was to be employed, he had less understanding remaining and was under greater weakness of mind, than there is reason to attribute to him.

But there are appearances to induce a strong suspicion that the deceased never saw, nay, was never consulted either upon the instructions or upon the draft—and never was consulted respecting the will itself till carried to the solicitor's office to execute it. First, the instructions are not signed—a precaution, which an old experienced attorney, like Mr. Richard Wyatt, would naturally have taken under such circumstances of delicacy, if the deceased had been consulted: but secondly, that which leads more strongly to a suspicion that the deceased was never even consulted with on the instructions or on the draft, is, that Carolan's christian name is left in blank in the instructions—in the draft—in the engrossed copy—and is not filled up till the execution! Who is Mr. Hugh Carolan?—the deceased had been lodging in his house for two years and a half—paying him for his lodgings repeatedly—it was a weekly lodging—he must have known his christian name—nay, here is this paper leaving him the annuity of 200*l.* in which it occurs three times, and which even begins with the address, “Mr. Hugh Carolan, Sir”—The blank then for the christian name remaining till the very execution, renders it highly suspicious and probable that neither the instructions nor draft had ever been communicated to the deceased, and that he had not even been consulted upon them—at all events there is no proof that his opinion was ever taken upon them.

The act then originates, (at least nothing appears to the contrary) with Richard Wyatt—it commences with his carrying instructions, written by himself, to his town agent, Mr. Adlington. The employing Mr. Adlington would not carry with it any suspicion, provided the deceased had gone or been taken there to give instructions himself—Adlington and Gregory had been before employed to procure the change of name and to receive money from the Accountant General. The deceased had no solicitor of his own—he does not appear ever to have employed one. If the will had been the deceased's own act, the house of Adlington and Gregory might therefore have naturally and properly been resorted to;—and if the deceased had come or been brought to their office—if, being left alone with Mr. Adlington, he had himself given the instructions clearly and rationally—still more if Mr. Adlington had probed his mind and satisfied himself, (and in thus satisfying himself, he would probably also have satisfied the Court) that the deceased was acting under no improper influence, but on his own unbiassed intentions and wishes—the case would have been free from difficulty. Mr. Adlington, as far as the Court knows and must presume, is a respectable solicitor—of unimpeached character, and sufficiently disinterested to be entitled to full credit—but the case presenting itself in the manner it did, it is possible

that Mr. Adlington's professional caution may have been lulled and his vigilance surprised by his confidence in Mr. Wyatt, to whom he stood much in the relation of attorney to client. That Mr. Adlington was privy to any fraud, or circumvention, or even suspected any, the Court has not the least reason to suppose. His evidence clears him of such an imputation, for he has no perfect recollection of any part of the transaction—he seems to have considered himself as a mere instrument to carry into formal execution an act which he was performing under the direction and at the responsibility of Wyatt, trusting to him that every thing was right—he never appears to have imagined that he was conducting business requiring the exercise of his watchful care as the testator's solicitor—consequently no portion of the transaction has left an accurate impression on his mind—otherwise some of his errors would be unaccountable lapses of memory. If the deceased had been a person of full capacity and Wyatt quite a disinterested party, Mr. Adlington's conduct would have been sufficiently correct: but surely had he been aware of all the circumstances to which the Court has adverted—the supine character of the deceased—the small extent of his capacity—the imposition to which he was liable and which Carolan had already practised on him—the amount of the property he was giving to a total stranger in blood—and that person standing in the suspicious relation of his attorney and agent—he would without doubt—giving him credit for character and the professional caution belonging to such character—he would, I say, without doubt, have pursued a different course—he would have said to Richard Wyatt—“All this I have no doubt is perfectly right; but recollect! you yourself stand in a delicate situation as Attorney and Agent of the deceased—the will is in favour of your son—and Mr. Clopton's family is absent;—for your own sake—for your own character—and in order to insure the kind intentions of this gentleman against suspicion and against defeat, bring your Principal to me—let him give me the instructions with his own mouth—not from your written paper.” If his caution had not been blinded by confidence in Wyatt, Mr. Adlington would surely have thus acted.—His evidence appears to be given with perfect fairness and truth, naturally however with some degree of bias in favour of the validity of the will; and also under a great failure of memory.

At first, and in chief, he supposes that the deceased was, or at least is doubtful whether he was not, with Richard Wyatt when the instructions were brought to him; but on cross-examination, having in the mean time conferred with his partner Mr. Gregory (which was not quite correct) he is satisfied that Richard Wyatt came alone. This is an error quite unaccountable except on the reasons already stated: he has no recollection of any discussion or conversation that passed, or even of the exact time when the instructions were given: strange again considering the nature of the instructions!—he has made no entry, because he meant to make no charge, as he supposed Richard Wyatt would make none; so that he considered himself as acting completely as Richard Wyatt's agent and for his benefit—he supposes that the instructions were delivered on the third of August:—that can hardly be accurate, for the subsequent note about the legacy to the poor, is dated “Friday morning,” and Friday was the third;—he delivered the instructions to his clerk from which to prepare the draft—he corrected the draft—then a fair copy was made which he says he sent either to Richard Wyatt at the Black Lion

in Water Lane, or to the deceased at Carolan's: another strange failure of recollection! he could however only doubt while he was under the belief that the deceased attended—surely not after he discovered that Richard Wyatt only was present;—but there is no probability nor trace that he sent it to the deceased, with whom at that time he had had no intercourse respecting the will.—The first time then Mr. Adlington saw the deceased on this subject was the day of the execution—the 4th of August;—and he thus deposes:

“On the day of the execution of the will, Richard Wyatt came with the deceased to the deponent's office: they brought with them the fair copy, and it being approved by the deceased, and no alteration having been previously made or then suggested by the deceased, it was executed in the deponent's presence. Of what passed in conversation deponent has no recollection, and he has no memorandum of any thing that then occurred; but it has always been his invariable practice to be careful and particular in every thing relating to and attending the execution of a will in his office, or to which he is a subscribing witness:”—I have no doubt he took care there were three witnesses present; that the deceased executed it in their presence; that they attested it in the presence of each other, and so on. “He has a further recollection as to this particular will that his attention was more especially directed to it from the nature of its bequests. Whether deponent read the will to the deceased, or deceased told deponent that he had read it or not, deponent does not remember; but deponent undoubtedly satisfied himself that deceased knew its contents and approved them: deponent has no recollection of Richard Wyatt having left the room: to what passed in conversation he cannot depose, but he remembers that they had conversation together before clerks were called in: deponent can and does depose with perfect confidence that he was fully satisfied the deceased knew and approved of the will; that it was his own act, and the clerks being called in the execution would, and deponent has no doubt, did take place according to the usual form. Deponent well remembers that the deceased desired him to keep the will, and that he did so. The deceased might be with him on that occasion previous to the execution of the will for perhaps a quarter of an hour: the execution itself could have occupied but a short time. Either then, after the execution of the will, or at a subsequent interview, when deponent saw him alone, and had a good deal of conversation with him; the deceased asked him, ‘if he might not make a codicil,’ and deponent replied, ‘certainly, whenever he pleased.’ Deponent does not remember on which occasion this occurred, or whether it might not have occurred on both: the circumstance deponent remembers well, and he would rather have thought that it was on the subsequent occasion, but that Mr. Henry Wyatt, on the deponent lately mentioning it to him, said, that it was at the time of the execution of the will; from which circumstance it would appear, as indeed Henry Wyatt also stated, that he, Henry Wyatt, was present at that time; but of his being so present deponent had not the least and has not now any distinct recollection. From the name ‘Hugh,’ and the word ‘twelve’ in deponent's handwriting supplying two blanks in the first side of it, deponent has no doubt he went over the will with the deceased and filled up those blanks from his directions. Certainly at such a time, and the deceased himself being present, deponent would not have taken any information or direction whatever from any other person: moreover Richard Wyatt was very deaf, so much so as to make

it troublesome to communicate with him; and it is probable that he would hear but little of what passed between deceased and deponent."

Now the whole of this is mere inference and conjecture—there is no recollection of facts, upon which facts the Court can form its judgment—"he must have made the deceased acquainted with the contents because it was his usual practice:" but this was an unusual sort of business, for the regularity of which Mr. Adlington seems to have pinned his faith entirely on Richard Wyatt. There were two slight blanks then filled up—one for the christian name of Carolan—the other for the number of months at which the legacies were to be paid—"he must have applied to the deceased—he would not have applied to any one else—besides Richard Wyatt was deaf:" but the deceased also was rather deaf and shy and almost blind—and Henry Wyatt was present, who was neither deaf, shy, nor blind—why should he not for such a purpose have applied to him? it is quite as probable, when the blanks were not material parts of the disposition. But what reliance can be placed either on the recollection or the reasons of Mr. Adlington? At first he supposes Richard Wyatt alone was present; he then admits that Richard and Henry were both present—but what if he is mistaken in both? Now Henry Wyatt in his answers expressly states that his father was not present at all at the execution, and therefore *his* deafness was not a reason for applying to the testator. "To the sixteenth article respondent answering saith he admits that he but *not* his father was present when the said will was executed:" so that Mr. Adlington has forgotten the whole business—he is no better than a dead witness, whose character and handwriting are proved. Mr. Adlington's character stands unimpeached and he means to speak the truth—but the result of his evidence, in connection with Wyatt's answers, is that on August the 4th young Wyatt—the executor—to whom the great bulk of the property is left—after having taken the deceased to dine tête à tête at Hamstead the day before (for he will not say it was not on the 3rd that they went to Hamptead)—carried the deceased to his (Wyatt's) agents who had never seen the deceased on the subject of the will which was ready drawn up for execution from instructions brought by Richard Wyatt,—and Mr. Adlington cannot recollect any conversation—nor how far he probed the deceased's mind—nor what passed to show that the will was prepared by his authority or desire, or approbation, so as to enable the Court to form its own judgment—but he is of opinion that he must have ascertained the fact! The forms of execution according to the statute he may have attended to; but is that to overcome all the legal jealousy and all the difficulties of such a case?—of this will, not only giving Carolan £1000, but also revoking the "will of interment," without substituting any directions about his funeral; though to guard against being buried in London, was an object of all others, or rather was the only object resting on the mind of the deceased? These are considerable difficulties and suspicions, and, in my judgment, they are not removed by this evidence; and the clerks merely deposing to a formal execution, carry the proof of the *factum* no further. But there is a codicil purporting to confirm this will.

The deceased remains in London nearly a year afterwards, though talking about going into the country, but being prevented by some frivolous cause or other. There is during this interval no intercourse personally with this executor, nor are there any letters recognizing, even by inference, that Henry Wyatt was his adopted heir. The only letter

is that of October 1821 disapproving of the present of a goose, and desiring that no more goose may be sent. At length, in June 1822, after endeavouring for four years to make up his mind to go to Stratford, he proceeds there accompanied by Carolan, who pretends to be going to Liverpool; but who, after depositing the deceased at the Red Horse Inn at Stratford on the 24th June, early the next morning returns to London: so that whether Carolan did or did not persuade the deceased to go; yet it is necessary to practise a deception upon him, even according to Henry Wyatt's own account; and this deception awakens a suspicion that he is carried to Stratford by contrivance and preconcert, in order to place him the more completely and securely in the possession of Henry Wyatt—the latter had long before prepared the mistress of the Inn, Mrs. Gardner, to expect “an eccentric old Gentleman, and she must take care to keep the house quiet for he did not like noise:” he did not come at the appointed time—however at last he arrives unexpectedly. The next day Henry Wyatt calls and Mrs. Gardner announces him to the deceased—What says the deceased, or how does he act? as one come to see an adopted son?—

Mrs. Gardner thus deposes: “that the deceased, on deponent's telling him Mr. Henry Wyatt was come, desired to see him, and told her to bring him a quart of ale: the deponent thinking it more respectful to Mr. Wyatt asked the deceased if she should not bring a jug and glasses—the deceased said, ‘No, he is only my tenant, a quart will do.’ ”

This is the deceased's treatment of his adopted son, and one who was the heir of his property!

The next morning the deceased is fetched away in a gig and is carried to Clopton House, and there he remains till his death. He had not left London with that view—he had retained his lodgings and left his boxes and their contents at Carolan's; and these lodgings he keeps till his death. He frequently talks of going back to London, and once has his clothes actually packed up; but at Henry Wyatt's he remains. He is treated with great kindness and attention—his taste in eating and drinking is consulted—he has the best bed-room at first—but that not being so convenient for some reason, either on account of the difficulty of getting him up stairs at night, or on account of his chilly temperature, Henry Wyatt's dressing room on the ground floor is fitted up as his bed-room. That room he inhabits, and uses it for all purposes—the same filthy purposes as formerly—so as occasionally to be offensive—there Henry Wyatt goes of a night to take his glass of brandy and water—and a servant sleeps in an adjoining apartment, in order to attend to his wants in the night, and he occasionally heard him singing out according to his old habit, “Yehep, Yehep.” All this may be quite equivocal: and to endeavour to make his benefactor as comfortable as possible in his declining years, and to give him the benefit of the cheering society of his friends and visitors, would appear, if the will was satisfactorily proved and nothing further done, to arise on the part of Henry Wyatt from a very proper sense of the debt of gratitude; but, on the other hand, this conduct and treatment might be for the purpose of more securely retaining him in his possession and under his influence, and from a fear that, if he should make his escape and return to London, some fortunate or fraudulent person might undo all that had been already done and get a new will from him; for the deceased apparently still retained a testable capacity. Indeed it might not be quite certain that some act had not been already obtained subsequent to the will. An attorney would well

know that if there was any risk of that sort, a republication of the will by a codicil would be a great security, besides being a means of conveying an additional benefit to himself: and this is a further reason why the law looks with more jealousy and suspicion at the acts of an Attorney in his own favour than those of other persons—because possessing greater opportunities and better information for carrying his purposes to a successful issue, he is more likely to originate and to suggest them.—What is the fact? Within three weeks after the deceased arrived at Clopton—ere yet these kindnesses could have added much to his affection for Henry Wyatt—and before it was possible that any offence could be taken at his sister for not having been over to visit him, (for she lived twenty-five miles off, was upwards of 80 years of age, and *non constat* that she was aware of his removal from London to Clopton)—the making of a codicil is put in motion and has made great progress: for he reached Clopton House on the 26th of June, and the codicil was delivered to be copied on the 19th of July. Not one syllable from the deceased, in the way of declaration to any human being that he wished to alter his will and confer a greater benefit on Henry Wyatt, appears in the evidence—he had been introduced to Mr. Lloyd, and Mr. Lloyd had called at Clopton; Mr. Pritchard was attending at Clopton, though not on the deceased; others may have been introduced; but there is not a trace of the least expression by the deceased himself of a wish to alter his will or to do any testamentary act—not the slightest proof of any instructions from the deceased—but this Attorney and Agent having this old man in his house, himself draws up this codicil and gets it copied, ready for execution, by a law stationer. Now what are the words of the paper? Here is a reference to the will cautiously by its date thereby republishing that will, and excluding any subsequent will made in the intermediate time: here is a revocation of the sister's legacy simply, and then here is a ratification and confirmation of the will and an attestation by three witnesses. It is in these terms:—

“Whereas I John Clopton of the parish of Saint Pancras in the county of Middlesex Esquire did by my last will and testament in writing duly executed bearing date in or about the month of August one thousand eight hundred and twenty one Give and Bequeath unto my sister Barbara Ingram the Sum of Two Thousand Pounds Now I do by this Codicil which I desire may be annexed to and taken as part of my said will Revoke and make null and void the said Legacy or Bequest of Two thousand Pounds so as aforesaid given to my said sister, and I do in all other respects ratify and confirm my said Will and every Article and Thing therein contained In testimony whereof I the said John Clopton have to this Codicil set my Hand and Seal this fifth day of August in the year of our Lord one thousand Eight hundred and Twenty-two.

“JOHN CLOPTON (L. S.)

“Signed sealed published and declared by the said Testator John Clopton as and for a Codicil to be annexed to his last Will and Testament, and to be taken as part thereof in the presence of us

“JOHN GAML. LLOYD

“JAMES PRITCHARD

“REBECCA TWIGGEN”

On considering this instrument three observations present themselves.

First: It was perhaps thought safer to revoke the legacy of 2,000*l.* to the sister, than either the legacy to Carolan, or that to the cousin, Miss Barbara Ingram.

Secondly: This republication of the will in the presence of three witnesses would completely set it up again, even if any intermediate instrument had been procured either by Carolan or by any other person.

Thirdly: So cautiously worded is this codicil that in reading it over in order to execution, no person—not even Mr. Lloyd, a barrister—would find out or be led to suspect that any imposition had been practised, because it does not appear, to convey any benefit to the confidential Attorney, Mr. Henry Wyatt; though that gentleman very well knew that, besides republishing the will, it would, by revoking the legacy, convey a benefit of 2,000*l.* to him, as residuary legatee.

Exposed however as this codicil is to these suspicions, they might still by possibility have been removed by something passing at the execution, or even by subsequent recognitions. The deceased might have given such explanations of his will and such reasons for making this codicil, and all this might be proved by witnesses so far above all suspicion as completely to silence all objections:—but what is the evidence? The executor first appoints the law-stationer, on two different days, to attest the execution, but that act is postponed: he then thinks it better to apply to a respectable neighbour and acquaintance—a barrister at law, Mr. Lloyd—who had once seen the deceased with Henry Wyatt in his gig, and had called for about ten minutes at Clopton House, and been asked by Henry Wyatt, if he had any objection to attest the deceased's will. Henry Wyatt also applied on the same day to Mr. Pritchard, an apothecary, (but who had never then attended the deceased professionally) to meet Mr. Lloyd on the following day—Rebecca Twiggen, Henry Wyatt's own nurse-maid, was merely called in at the moment to make a third witness, and thus the codicil was rendered a valid confirmation of the will of lands. Mr. Lloyd arrived first and they waited for Mr. Pritchard about a quarter of an hour: Lloyd thus deposes:

“That in the course of that time he believes nothing passed between him and the deceased beyond the usual salutation at meeting, and nothing passed, as he recollects, between Henry Wyatt and the deceased. Deponent remembers that conceiving it to be a will that was about to be executed, he asked Henry Wyatt, who was to be the third witness? to which he then replied, ‘that it was a codicil, and that it related only to personal property.’ The deponent thereupon said, ‘that two would do very well.’ Mr. Wyatt then observed ‘but there is a small freehold estate bequeathed in the will, and so we may as well have another witness; we can call in the nurse.’ Deponent remembers that Henry Wyatt produced two or three sheets of paper (as it appeared to the deponent) and proceeded to read, and read aloud, what purported to be a codicil to a will of the deceased of a date recited in the said codicil. What the said Henry Wyatt read was in substance simply to revoke a legacy which had been given by the said will to the sister of the said deceased. Whether Mr. Pritchard and the nurse, or either of them were present at this reading or not he cannot depose: Henry Wyatt then said to the deponent ‘will you ask Mr. Clopton if that is what he wishes it:’ deponent did so, and the deceased in an angry tone replied ‘Yes, yes:’ Deponent looked to Henry Wyatt, who then said to the de-

ceased 'I requested Mr. Lloyd to ask that,' or to that effect. It appeared to deponent as if the deceased thought that deponent was interfering with the disposal of his property. He appeared to be satisfied with the explanation of Mr. Wyatt; and signed his name, Mr. Wyatt having placed the paper before him. The deceased was shortsighted, and deponent thinks he recollects that as he was poking about rather over the paper to see where to write his name the said Henry Wyatt pointed his finger to the place, and the deceased then freely signed his name."

In a further part of his deposition he says, "he believes the deceased to have been of sound mind, memory and understanding, and capable of making and executing a will or codicil. The deponent had had at the time of the execution of the codicil but little opportunity of judging of the deceased's state of mind: he saw nothing then and had seen nothing previously to raise a doubt as to the sanity and capability of the deceased; but considered him to be a reserved man of somewhat peculiar habits, certainly not the sort of man whom one would expect to meet as a member of an ancient family, and possessed of large property."

Here then is an execution in the presence of Henry Wyatt, a reading over by Henry Wyatt—an answer "Yes, yes," angrily by the deceased, but which anger is quieted on Henry Wyatt's explanation, and then follows the formal execution. The other witnesses carry the history no further—indeed not so far—they were not even present at the reading, though there is no doubt from Lloyd's evidence that the ceremony did take place—Lloyd, who gives honourable and fair evidence, is of opinion that the deceased was capable; but there was no probing of his capacity, still less was there any thing to prove volition and intention either then, or afterwards to Lloyd, who was wholly uninformed that any benefit was conveyed to Henry Wyatt by this instrument. This appears from his answer to the forty-second interrogatory:—

"Respondent called at Clopton House, and there saw the deceased alone in or about the month of January, 1823. The deceased said upon that occasion that he should like to go to London. Respondent told him, that if he were the deceased, he, respondent, would go to London during the cold weather, and enjoy the company of his friends, and return to the country in the spring. The deceased had told respondent that he found Clopton House very cold, and he expressed a strong inclination to go to London. Respondent said, what he has deposed, to the deceased, partly in consequence of his having understood from Henry Wyatt some time after the execution of the codicil, that it was beneficial to the producent; and respondent therefore encouraged the deceased's idea of leaving Clopton House for a time, that he might have some intercourse with his family or friends. The deceased certainly replied that he should like very much to go to London. Respondent believes that such was the wish of the deceased at that time; and respondent has declared, and it is the fact, that he thought either Mr. Clopton had communicated that conversation to Mr. or Mrs. Wyatt, or that it had been overheard; for the next time he met them he observed a marked difference in their behaviour to him the respondent, which he could attribute to nothing else."

This evidence does create a pretty strong suspicion that these subsequent attentions were for the purpose of keeping possession of the deceased; for possession and custody may exist without actual control and coercion.

It only remains to examine the recognitions that have been relied upon; and it is to be observed that, under the circumstances of the present case, mere remote references to something which by construction may be supposed to show a kindness and intention to benefit Henry Wyatt will not be sufficient—there must be some direct reference to, and explanation of, these testamentary acts, something going distinctly to their nature and contents in order for such circumstances to supply the want of instructions and the absence of explanations at the execution—less than that will not be sufficient to satisfy the demands of the law, and to overcome the suspicions attaching upon these transactions.

Two witnesses, and two only, have been relied upon as speaking to any thing of the sort, Thomas Hunt and William Lewes. Now Hunt speaks only to one equivocal declaration, not directly alluding to any will—which declaration might have been insincere—or might mean future intention—or may have been misapprehended or misrepresented.

On the second article he says: “Deceased frequently told deponent that he had every thing at Clopton he could wish, and was never more comfortable in his life. I go where I like—I have what I like, he used to say, and they are very kind to me.” . . . . “He one evening said, Harry and his wife do every thing to make me comfortable: they are the best friends I ever had, and it wont be the worse for them: I have not forgotten them.”

Now when this might easily be misapprehended or be a mere momentary ebullition of gratitude, and when it comes from an intimate friend of Henry Wyatt—from one who has made himself so far a partizan in the cause as to send for an adverse and important witness, Robins, and talk to him in the way he himself admits upon the additional interrogatories, this declaration goes but a little way, or rather goes no way at all, to supply the want of instructions and overbalance the other defects and suspicions of the case.

The other witness is Mr. Lewes; he presents himself under circumstances exciting some degree of caution—he could not be examined under the commission because his place of residence could not be found—from embarrassed circumstances he could not be communicated with directly even by letter—a letter could only be sent through the intervention of a third person, a confidential friend—he has not been cross-examined, for he would not originally stay to be cross-examined, and he has not been reproduced.(a) Mr. Henry Wyatt however appears to have been extremely anxious that his deposition should be received—thereby raising something of an inference that he expected him to speak to facts to which no other witness could depose—though several other friends and visitors have been examined to the same articles of the allegation, yet to them nothing of the kind was ever said—not even to Mr. Lloyd, though he had attested the codicil and held something of a confidential conversation with the deceased the following winter on his expressing a wish of going to London; but no recognition nor declaration was made to him or to any other person. Lewes does speak more strongly than others, and to some circumstances exclusively. He is a sportsman, coming from Carmarthen for a few months in winter to the neighbourhood of Stratford for the sake of hunting—and, as such, visiting Henry Wyatt who was fond of the same amusement;—they were very intimate;—Lewes went to Clopton

(a) Vide *suprà*, p. 42, et seq.

House very frequently;—he speaks strongly to general capacity—to Mr. and Mrs. Henry Wyatt's attention, but adds with cautious discrimination, "that he never saw any thing, on their part, like fawning, or any attempt unduly to ingratiate themselves;—and to his frequently visiting him in his little room." On the thirty-first article he thus deposes:—"During the days deponent was at Clopton in the summer [of 1824], the deceased was living in the room below stairs; he did not then take his meals with the family, or indeed leave the room at all: deponent was alone with the deceased several times: sometimes Henry Wyatt was with them: deponent was with him both mornings and evenings." . . . . "Henry Wyatt used to go to deceased in the evening, and deceased was pleased to have him there with him, and there they have chatted together and very pleasantly too. Deponent has seen Henry Wyatt take a glass of spirits and water there with the deceased in the evening:" All this would be gratifying to the deceased without doubt; and the whole of it occurs in the little room which served the deceased for all purposes.

On the thirty-second article he says;—"The deceased seemed perfectly satisfied with every thing and expressed himself so. 'Where you go,' said he, 'do you ever find more comfort than there is here, good cooking, famous wine, and the like.'"—These indulgences again—to which he was rather addicted—were all calculated to make a pretty strong impression on a poor, weak, inert man who had not mind enough to resist fraud and influence, nor to have any will of his own.

Further on—"Deponent remembers one day the deceased asking him what he thought Wyatt's income was? deponent said, he did not know: deceased said, he did not think his father could give him much; but no matter, he said, he'll have enough one day." This must have been during the former part of his acquaintance with him as he believes:" [this is not a very probable conversation to have originated with the deceased] "but there was a former occasion, and it was the first on which the deponent heard deceased speak upon the subject. Deponent had bought of Henry Wyatt a rather valuable chesnut mare: deponent told deceased of it. What! (said he) has Henry sold his favourite mare! deponent said, 'Yes, he has.' The deceased said no more then; but after dinner he renewed the subject, inquiring of Henry Wyatt if he had sold the mare? Wyatt said, 'he had.' Deceased asked 'why?' Wyatt replied, 'I wanted the money, Sir.' Deceased said, 'it is a pity you sold her;' and turning to deponent said, 'if he wants money now, he wont want it when I am gone.' [This is one of the recognitions.] "At another time he said, 'I have made Henry quite independent of his father and every body else;' and again he said, 'his father has not much to leave him, but I have taken care of him.' To the particular times he cannot depose: he frequently spoke to deponent to that effect." [The deceased, who is a very silent man, talks, according to this witness, frequently on this subject.] On the thirty-third—"the deceased told him his sister was older than himself; and on one occasion he said 'she won't survive me, I am a good man yet.' He said once, that his sister, as deponent understood him, had brought up two bastards of a farmer; one he said, had married a Sir Somebody (deponent forgets the name;) the other, he said, had married Mr. Severne; and, he said, they should not have his money; but using gross expressions 'damned nasty stinking bastards:' when in particular he said this, deponent cannot remember."

Upon the evidence of this witness there arise some important considerations: upon two points in particular—the recognitions. The first is the recognition made upon the sale of the chesnut mare. This is either true or it is not true;—if not true, there is an end of the credit of the witness—and he alone deposes to it—the deposition is suspicious in its whole tone: if true it is exposed to a suspicion that the matter was fraudulently held out in order to work upon the deceased—it was “rather a valuable chesnut mare,” so that no great price was given—she was a favourite, but so distressed is Henry Wyatt that he is obliged to part with her, because “he wanted the money.” Was that true, or is it liable to the suspicion of being a false pretence, in order to work upon the deceased? Now it appears by the accounts, that of the rents becoming due after Michaelmas 1820, only 250*l.* had been remitted before the deceased went down in June 1822, and only 650*l.* in the whole.—Three half years had intervened—Lady-day 1821, Michaelmas 1821, Lady-day 1822. By the accounts exhibited No. 5 and 6, the whole rents due at Michaelmas 1819 appear to have been remitted when the account was settled in June 1820, and the whole rent due Michaelmas 1820 had been remitted when the account was settled in July 1821—and yet in June 1822 only 250*l.* and in August only in the whole 650*l.*—so that of the rents due Michaelmas 1821 (supposing nothing to have been received on the half year, Lady-day 1822) there was a balance in Wyatt’s hands of about 900*l.*—it could hardly therefore be true that he was obliged to sell the favourite chesnut mare “for want of money.” This story lies consequently under a considerable suspicion of being either the invention of the witness, or the circumvention of the executor in order to work upon the deceased’s weakness.

The other circumstance is still more suspicious, that “his money should not go to those damned nasty stinking bastards;” for the witness undertakes to give the very words—though he will not venture to fix time or place—whether up stairs, or below stairs in the little room. Now no other witness deposes to any allusion respecting the Severnes as bastards. Yet the executor has pleaded it as a fact—has inserted it in his interrogatories,—has introduced it into his answers that the deceased alluded to the Farmer’s bastards, when he gave instructions for the codicil:—It is put prominently forward in order to account for cutting off the Sister. Now that they are bastards is not the fact—neither Mr. nor Mrs. Severne are illegitimate—there is no evidence that either of them was ever reputed or even supposed to be bastard. Mrs. Barbara Ingram, the cousin, who is very intimate and nearly connected with them, never heard it suggested:—On the twenty-first interrogatory, Respondent answers: “She does not know, has never heard, and has no reason to believe that either Samuel Amy Severne or his wife is illegitimate or reputed so to be.”

The real history of Mrs. Severne is stated in Mr. Severne’s evidence upon the twentieth interrogatory: “Respondent did intermarry with the daughter of a Gentleman Farmer of Barton and Long Compton, an estate in the former of which was his own property. The Father of the respondent’s wife and her mother also died when she was young, and she had been under the care of the late Mrs. Ann Ingram and of the producent, who were then living together at Little Welford. Mrs. Ann Ingram was not a lady of considerable fortune; she had a moiety only of the Little Welford estate, and Mrs. Barbara Ingram, the pro-

ducent, was at that time and until the death of her brother, Edward Clopton, a lady of small fortune. Neither the respondent nor his family have derived any property real or personal from Mrs. Ann Ingram or the producent, except that Ann Ingram left him a gold cup.' Mrs. Mary Ingram did die on the 14th of December, 1824. She, by will, bequeathed to him and his children specific legacies to the amount of about, 2800*l.*; and in the October preceding her death gave his eldest son an estate worth 700*l.* per annum." Here then is the real fact proved: and as to this declaration, it either was or was not made—if not made there is an end of the witness—if made, how came the deceased thus impressed, that if he left any thing to his sister it would go to Severne and "the nasty stinking bastards." There is no trace in the evidence of any anger or disaffection towards Mr. Severne before the deceased arrived at Clopton House—even afterwards no other witness hears of it than this Mr. Lewes—but Henry Wyatt makes it his case and his witness deposes to it. Does not this circumstance create a new suspicion, that this was an artifice resorted to in order to render the deceased more subservient to the wishes of Henry Wyatt, and in order that, if his torpid understanding and dull attention should catch the object of this codicil when the execution should be gone through, his mind might be impressed with a feeling which would induce him to acquiesce in its contents? His angry "yes yes," is not inconsistent with something of the kind.

But there are two other circumstances still further exciting suspicions of circumvention and imposition.

The first is—that of the rents received from Michaelmas 1820 to November 1824—the time of his death—four years—only 650*l.* is remitted to the Bankers to be invested according to the arrangement; and Henry Wyatt sets up a donation of these rents by the deceased in his life time, because, not having remitted them, he was bound in some manner to account for the omission of following up the arrangement. In support of such a donation, there is not a scrap of paper—no written authority to Henry Wyatt to retain it—no letter from the deceased to the Bankers explaining why further remittances were not made—even Henry Wyatt omits to send, as on behalf of the deceased, any such explanation—at least there is no suggestion to that effect in the interrogatories. Any explanation, attempted in the life-time of the testator, would, perhaps, have been dangerous—it might have led immediately to some inquiry into the matter, and to an investigation of this pretended donation and of the state of the deceased, by the Sister, or by her friend, Mr. Severne, on her account. Silence was safest: so here is no declaration to any person—a gift by parol only is alleged, and to it Henry Wyatt alone is privy. The amount is 5000*l.* or 6000*l.*—four years rent—Wyatt rests upon the donation—he will not charge himself with those rents in his inventory. What! does an Attorney and Agent, with an old man seventy-two or seventy-three years of age, living in his house, in his possession, entirely separated from his own family, who has never done any one act of business respecting the management of his estates since he came into possession of them, accept the rents and profits of these estates—1500*l.* a year—and apply them to his own use under an asserted gift by parol, and yet expect that the law will not attach great suspicion to such a transaction, and to all other transactions

between him and the deceased respecting his property?—The answer is too obvious and the fact is not without its weight.

But the remaining and final circumstance is still more direct in its inference—the conduct of Henry Wyatt on the death of Mr. Clopton. The deceased died on Saturday, November the 20th, at 5 o'clock.—On Sunday the 21st, Henry Wyatt writes a letter to Mrs. Ingram of Thenford, the cousin of the deceased, desiring her to communicate to Mrs. Barbara Ingram, who resided with her, the death of her brother—the party deceased—Mr. John Clopton. By the evidence of the Apothecary, it appears that the deceased had been confined to his bed near a month, and had been in danger a week, if not a fortnight—yet no sort of communication was made to the relations—the Sister and cousin—who were residing, within twenty-five miles of Clopton House, at Thenford—where also their friend Mr. Severne was, who might have gone over to see the deceased: but on the Sunday evening, after the death, Wyatt writes, announcing the death of Mr. Clopton after a week's illness and stating that he was sensible to the last. This is not very correct conduct: it is suspicious, both as to the concealment and as to the falsehood in respect to the length of the illness;—but on that very Sunday evening he sets off for London—is sworn to the will the next morning, Monday—gets probate under seal on the Tuesday morning—goes immediately to the Bankers and obtains possession of the money there: but that is not all—he hastens without a moment's loss of time, to the Bank of England, and attempts to have all the stock transferred into his own name, but, some difficulties occurring there, he does not succeed and that object is frustrated. This may by possibility have been the mere haste and eagerness of the heir—or it may have been that aware that, at all events, the possession of the property would give him considerable advantage in any subsequent contest about his right to it, he endeavoured to secure every thing before the family could interpose: but this conduct has a still more unfavourable aspect, and carries with it a strong appearance of a consciousness of fraudulent circumvention, and that these testamentary instruments will not bear investigation. Snapping a probate (as it is called) is always considered to create a suspicion of fraud. In the case quoted it is stated by Dr. Calvert that Sir George Hay, in *Ousley v. Wells*, supra, p. 173, laid the foundation of fraud in the executor amusing the next of kin in order to prevent the taking of administration, till he had obtained probate—"it showed a *mala fides*:"—here it is stronger—he writes on Sunday evening—he knew the state of the cross-posts—and before it was possible that the sister could enter a caveat, he gets his probate—but not his probate only—he has got all the ready cash, and he would have got a transfer of the funded property, if it had stood in the name of Clopton, instead of that of Ingram.

Under these several circumstances of suspicion—for I carry it no higher—the proof of the *factum* is insufficient. The capacity of the deceased, though not intestable, was so far weak and inactive as to require a cautious examination of any testamentary act, and proof beyond a mere formal execution—direct proof that the deceased clearly understood and freely intended to make that disposition of his property which the will purported to direct. Added to the difficulty arising from this weakness, it is a will in favour of an Agent and Attorney—in which case the law is jealous of influence on one side and of blind confidence on the other:—

the instructions, instead of being given by the deceased, come from the parties benefited, and the will is prepared under Richard Wyatt's directions—the codicil by Henry Wyatt himself:—the execution of both instruments passes in the presence of the Executor—is a mere formal transaction, without any thing to probe the capacity or to supply the want of instructions:—the suggested recognitions are insufficient in themselves, and were made—if made—at a time when the deceased was in possession of the Executor, under his influence, and exposed to any impressions that might be made upon his mind.

I am upon the whole of opinion that the Executor's case is not sufficiently established against all the presumptions and suspicions that attach to it. The Court therefore pronounces that the Executor has failed in the proof of the will and codicil: but, as actual fraud has not been established, I shall give no costs.

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In the Goods of HUGH ROSS.—p. 471.

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*On Motion.*

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The Court will not (on affidavits of capacity and final intention, and on consent) decree probate in common form of a paper written *in extremis*, and confused; where the interest of minors and of an infant is affected.

HUGH Ross, late of Bloomsbury Square, died on the 30th of October, 1827, leaving a sister, six nephews and a niece, (children of two deceased brothers) who would be entitled to his personal estate in case of an intestacy. Three of the nephews were minors, and the niece was an infant. On the day of his death, the deceased, in the presence of three of his friends, (one of whom was Mr. Roberts) and of his medical attendant, expressed a wish to make his will and requested Mr. Roberts to prepare it from his dictation, which Roberts did, and then read the will over to him. The deceased approved it; and, in answer to a question, "if he had any thing more to add," replied, "No, that is all." A pen was then placed in his hand, but he was prevented by bodily weakness from signing the paper, and shortly afterwards died. These four gentlemen had made an affidavit of the facts; and that they remained with Mr. Ross till his death: they also stated their full belief of his capacity, and that he perfectly understood the contents of his will.

The paper, after enumerating property to which the deceased considered himself entitled, and giving various legacies; among others, £500 to each of his three eldest nephews—James—Alexander M'Kenzie—and Hugh, with his gold watch and appendages to Hugh,—bequeathed "to Mrs. Hugh M'Intosh twenty guineas, and the *remaining sum* to his nephew Hugh Ross, on his attaining the age of twenty-two years." It then appointed an executor with £30 for a ring, and gave to Mr. Roberts fifteen guineas for a ring and seals; and there were some other small legacies; but there was no residuary clause.

The personal property was about £2,500.

The deceased's sister, and the three minors, and the infant, whose interests were alone affected by this paper, consented to probate in common form: the consent of the infant was by her mother and guardian.

The *King's Advocate* moved for probate.

*Per Curiam.*

When this paper was written, the deceased was *in extremis*: the paper itself is confused: it would be dangerous, on a mere affidavit of capacity and final intention, to decree probate of it in common form, especially as it affects the interest of minors and an infant, whose consent is not sufficient.

Motion rejected.

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AKERS v. DUPUY.—p. 473.

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*On Motion.*

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Administration *durante minoritate* formerly granted to the mother, having ceased by the minor's death, and the mother having thereby become joint residuary legatee with another minor, administration *de bonis non*, decreed to her; one executor having renounced and the other who was abroad being cited.

EDMUND FLEMING AKERS died on the 16th of February 1821; and of his will and codicils appointed Richard Walter Forbes and Isaac Dupuy executors and residuary legatees in trust. The deceased left a widow and one child, an infant, who was to take two third parts of the residue of the testator's personal estate, upon his attaining the age of twenty-one; the remaining third was left to a grandson when he should attain the same age. Forbes renounced probate and administration, and Dupuy being abroad was cited, after which administration was granted to Mrs. Akers, the widow (as the mother and guardian of the infant) for his use and benefit until he should arrive at twenty-one. The infant died in 1822: by his death the administration ceased, and the widow became entitled to a share of the lapsed residue; and, in order to supply a personal representative to the testator's estate, she had caused a second decree to be served on the agents of Mr. Dupuy (resident in the West Indies) and on the Royal Exchange.

Upon an affidavit to this effect, *Dodson*, for the widow, applied for administration with the will and codicils annexed to the unadministered effects of Edward Fleming Acres.

*Per Curiam.*

The widow is now a residuary legatee—the grandson is stated to be still a minor—about ten years of age—so that a third part of the residue is not yet vested. Let administration pass to the widow.

Motion granted.

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In the Goods of LIEUTENANT-COLONEL REID.—p. 474.

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*On Motion.*

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The Court at Madras—the competent jurisdiction—having granted probate to the widow as universal legatee and constructive executrix of an informal paper, in which character, no security is required: this Court, considering that under the circumstances the widow may be called on to prove the paper *per testes*, or that the grant may be appealed from, will only decree adminis-

tration with the paper annexed to her, as relict and principal legatee, on giving security.

THE deceased was Deputy Quarter Master General of the forces in India. On the 17th of September 1827, probate was granted at Madras, to his widow as the sole legatee, and as constructive executrix of his will. The will contained these passages:—

“The little property I possess being in household goods, plate, carriages, horses &c. I give, after all my just debts in Madras are paid, to my dearly beloved wife Lydia to apply and dispose of as she may think proper.”

And concluded in these terms:—

“I refrain from separating into small parcels the little property that may arise from the sale of my effects, but wish my dear and affectionate wife may enjoy the whole, after, as I before said, my just debts in Madras are paid.”

*Lushington* moved for probate as granted at Madras.

*Per Curiam.*

The deceased died on the 21st August, 1827, leaving a widow and two daughters by a former marriage. The will, of which probate is asked, is not executed, nor is the date, except of the year 1827, filled up; blanks being left both for the day and the month: there is also the word “witnesses” but of course it is not attested.

The Court however must presume that the Court of competent jurisdiction at Madras acted properly in granting probate of this paper as a valid instrument, and had evidence before it accounting for the want of execution and other imperfections: but I think it is very doubtful whether, according to the true construction, the widow is “sole legatee and constructive executrix:” for the deceased, when he wrote this will, was not, as it seems, apprized that he had any property in England to dispose of, whereas he had £330 in his agent’s hands. It is possible that the wife may yet be called on at Madras to prove this will in solemn form of law, or that, from the decree already made there, an appeal to the King in council may be prosecuted by the daughters of the former marriage. My difficulty therefore in granting probate to the widow as “constructive executrix” is, that she would in that character be exempted from giving security; but I see no objection to allow administration with the paper annexed to pass to her as “relict and principal legatee,” on her giving security. There is some difficulty in varying the form of the grant, but yet there is still greater difficulty the other way.

It is not fully decided, whether this Court is bound, in all cases and under all circumstances, to follow the grant of probate made by a Court of competent jurisdiction. India stands in a very peculiar relation to this country, and instances are every day occurring when this Court is called upon to decree probates on exemplified copies of wills, proved in that country, not always in the forms or according to the rules which are recognized by our domestic tribunals. The more numerous however these instances are, the more important becomes the consideration whether some remedy should not be provided, and whether the object would not best be attained by a short act of Parliament. It may be said that there is an appeal to the King in council from the decisions of these various Indian Courts:—it may often however happen

that but a very small part of the property is in India where yet the party may be domiciled, and then, according to the present practice, the probate in India would still regulate the grant here. In such cases therefore the party, in order to obtain that to which he is justly entitled, and which he would naturally obtain if this Court might follow its own rules, would be compelled to go to a large expense in appealing to the Privy Council from the irregular decision of a Court that has only original jurisdiction over a small part of the effects, but which, by a sort of courtesy, eventually regulates the whole. It is an evil for which, I think, some legislative remedy should be provided, and which I recommend to the consideration of those Gentlemen at the Bar whose attention may have been more immediately directed to such matters.

In the present case I decree administration with the will annexed to Mrs. Read as the relict and the principal legatee, the usual security being given.

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In the Goods of WILLIAM HINCKLEY.—p. 477.

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(*On Motion.*)

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Administration with a will (in which was no executor nor residuary legatee) annexed, decreed to two aunts of the deceased, legatees in the will, and daughters of the grandmother—the next of kin—she being ninety years of age and incapable.

*Lushington* moved.

*Per Curiam.*

The deceased's will contains no executor, nor residuary legatee; it has only bequeathed some small legacies. He died in February last, and has left a grandmother and two aunts—her daughters. The aunts, as legatees, now apply for administration with the will annexed; and they state, in an affidavit jointly with a medical man, that the grandmother is ninety years of age, and incapable of taking the administration. Upon this affidavit the Court grants the administration to the aunts, who are interested as legatees, and as the next of kin of the grandmother.

Motion granted.

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In the Goods of THOMAS VANHAGEN.—p. 478.

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*On Motion.*

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A paper having an attestation clause in the plural number but only one witness, and the date of the year written on an erasure: (on affidavit of the executor to a recognition and from the attesting witness to the time and intention of executing) probate of such paper, in common form, decreed, though one of four persons entitled in distribution refused to consent; but had entered no caveat.

THOMAS VANHAGEN died on the 10th of January 1828. His will, in his own handwriting, was dated on the 9th of October, one thousand eight hundred and twenty-three, and was attested and signed as follows:

In presence of *us* who have at } THOMAS VANHAGEN.  
 his request signed our names as } (L. S.)  
 under. } JOHN WEAKLEN.

The deceased left his property to his widow, who, with three sisters, was alone interested in case of an intestacy: two of the sisters had signed a proxy of consent, but the other refused. The widow and Mr. Hine—a solicitor and son-in-law to the deceased—were the executors; and Hine had made an affidavit as to a recognition of the will of the testator a short time previous to his death.

*Lushington* moved for probate to the executors, pointing out the informality that there was an attestation clause in the plural number, with only one subscribed witness.

*Per Curiam.*

From the appearance of the paper, and from the position in which the names of the deceased and of the witness are placed with relation to the attestation clause, it would seem that the deceased, at the time that these names were subscribed, had no intention of having more than one witness. (a) The chief difficulty is that the executors have not brought in an affidavit of the attesting witness—that the deceased intended, what was done at the time the witness subscribed it, to be an effectual execution of the paper as his will: for I observe that the word “three” is written on an erasure. On a satisfactory affidavit upon this point, the Court will decree the probate, since no caveat has been entered by the sister who declines to give her consent; and a recognition of the will is sworn to by the executor.

On the 3rd Session, an affidavit from the attesting witness having been filed, fixing the date of the will and stating his belief that it was the intention of the deceased to execute it at the time it was subscribed, the Court decreed probate to the executors.

Motion granted.

(a) In the Goods of GEORGE WINGFIELD SPARROW.

*On Motion.*

Probate in common form decreed of a paper with an attestation clause in the plural number and only one witness, on affidavit of an implied recognition.

THE deceased died in April, 1828. He left a will and codicil. The will was regularly executed; but the codicil dated in February, 1824, which he had written at the foot of the will, with a clause of attestation—“in the presence of *us*” was only attested by Mr. Denton the deceased’s solicitor. He was dead; but an affidavit exhibited by Mr. Briggs, his executor, (who was also a solicitor, and who had found the will and codicil among Denton’s papers) stating that Mr. Sparrow had in February last, some time after the death of his solicitor, seen and inspected these testamentary papers, and had left them in his possession, saying, “he would call again, and alter his will and codicil;” but he never came.

The Court—upon this affidavit, on motion by *Lushington*—granted probate of the will and codicil.

Motion granted.

## PICKERING and PICKERING v. PICKERING.—p. 480.

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On Motion.

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Administration *de bonis non* with a will annexed, in which was no executor, granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond their joint interests, and an affidavit of outstanding debts being made.

CHARLES PICKERING died in 1814. He left a widow, a son, and two daughters, Sarah and Sophia Pickering. By his will he made his wife universal legatee for life, and upon her death, he gave to each of his daughters 1000*l.*, and the residue to his son; but appointed no executor. On the 3d of May, 1814, the widow took administration, with the will annexed, in the sum of 3500*l.*; and, upon her decease, the son—being on military service in the East Indies—was cited with a decree to show cause why administration *de bonis non* should not be granted to Sarah, and Sophia, Pickering, *jointly*, as legatees. This decree with intimation was duly served.

*Haggard* now prayed the administration to be decreed to Sarah Pickering, *singly*, upon a statement that, since the issuing of the decree, the other sister had been, and still was, dangerously ill. He further moved, after mentioning that the testator's debts had been discharged, that the sureties might justify in the amount of the residue only, first deducting the amount of the legacies to the two sisters.

*Per Curiam.*

The Court will allow this administration to pass, in the form now asked; but it will first require either a proxy of consent from the sister, or else that security should be given to cover the £1000—the amount of her interest—as well as the surplus. An affidavit should also be exhibited that there are no creditors.

Motion granted.

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COOPER v. DERRIENNIC and Others.—p. 482.

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On Motion.

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A legatee—whose legacy had been paid him, having been examined without releasing—allowed to be re-produced on his and the executor's giving mutual releases, and on the latter depositing in the registry, to abide the issue of the cause, a sum sufficient to cover the legacy.

JOHN COURTOY died on the 8th of December 1818. On the 7th of January 1819, his will and codicil were proved. On the 3d of November 1827, a decree issued, under seal of the Prerogative Court (at the instance of William Henry Cooper—executor of the surviving executor of Courtoy) citing, among others, Mary Derriennic,—(resident in France) the sole person entitled to the deceased's estate under an intestacy,—to see the will propounded and proved in solemn form of law. Upon the return of the decree, the will and codicil were propounded in

a common *condidit*, and the three subscribing witnesses examined. On the first session of Easter Term, an appearance was given for Mrs. Derriennic and the cause was concluded: it was then discovered by the Proctor for Mrs. Derriennic, that William Giles—the deceased's attorney—drawer of, and a subscribing witness to, the will, under which he had a legacy of £300—had been examined without giving a release. The legacy with interest had been paid to him, in April 1824, under an order of the Court of Chancery; and he stated, in his affidavit, “that at his production and examination as a witness in this cause, the circumstance of his being a legatee in the will was omitted to be mentioned or alluded to by him or by any other person; and that in consequence thereof no release or discharge in respect thereto was then given; but that neither at the time of his production or examination as a witness, as aforesaid, had he any interest whatever under the will or codicil propounded, or any claim upon any person whomsoever touching the said legacy.”

An application was now made to the Court to rescind the conclusion of the cause in order that William Giles might, on giving a release, be re-produced as a witness, and again repeated to his deposition.

In support of the motion *Lushington* and *Addams*—who mentioned the case of *Peachey and Merricks v. Woodyer*, before Dr. Calvert, as decisive of the question. (a)

*Phillimore* and *Haggard* contra.

*Per Curiam.*

The Court granted the motion, remarking that interrogatories, on the part of Mrs. Derriennic, might be administered. (b)

The following order was made:—

(a) The editor has been favoured with a notice of this case. It was a cause of proving in solemn form the will of Charles Moxon: and was promoted by Dame Elizabeth Peachey and Elizabeth Merricks, the cousins german and only next of kin of the deceased, against Richard Woodyer the executor: and at the hearing, an objection was taken by Dr. Wynne and Dr. Scott to the testimony of Ann Ives, (a legatee under the will, who had received her legacy and given a release to the executor) on the ground, that she might be compelled to refund her legacy; that the release came from the wrong party; that it should have been given by the executor in order to release the witness from all future possible demands.

Dr. Harris and Dr. Nicholl, on the other side, argued that the executor could never compel Ives to refund;\* that the legacy had been paid for the purpose of making her a witness, and that she had performed her contract by being a witness: the executor had therefore received his consideration.

The Court (Dr. Calvert) admitted the evidence, and observed—it was usual so to do, though the books rather incline the other way.†

(b) In *Booth and Hannam v. Hurd*, Prerog. 1827, on its being alleged that Charles Read, an executor, had renounced previous to his examination as a witness; the Court on this day permitted a release to be brought in of his legacy of 100*l.* as executor (bequeathed to him if he undertook the execution of the will) and on the same being brought in, that he might be reproduced as a witness, and again repeated to his deposition.

In *Callow v. Mince*, 2 Vern. 472, a witness was examined before the hearing whilst she was interested, but after the hearing she released her interest, and was examined again before the master. Her depositions before the master were allowed to be read.—See also *Needham v. Smith*, 2 Vern. 463.

\* See the cases upon this point collected in White's edition of Roper on Legacies, Vol. I. p. 396.

† Vide Harris' Justinian, lib. 2. tit. 10. s. 11. *notis*.

The Court rescinded its order assigning the cause for sentence on the second assignation, and gave leave that William Giles be re-produced for the purpose of being re-sworn and re-repeated as a witness; a release under the hand and seals of the said W. Giles and W. H. Cooper, and also the sum of £400, to abide the issue of the cause, being first brought in.

*Note.*—This sum of £400 was deposited in order to obviate any possibility of claim by the residuary legatee under a prior will, in case the will propounded should be set aside.

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In the Goods of CHARLES BRODERIP.—p. 485.

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*On Motion.*

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Probate, in common form, of two papers (one unfinished) granted on a proxy of consent and on affidavits accounting for their state, and showing that the deceased intended them to operate.

THE deceased died on the 14th of April, 1828, a bachelor, leaving two brothers, William and Francis Broderip, his only next of kin, and the sole persons entitled to his personal estate in case of an intestacy.

The deceased had occupied apartments at the Salopian Hotel, Spring Gardens, for upwards of three years previous to his death; and on the 9th of April, while in bed, he requested Mr. Williams—his intimate acquaintance, to give him pen ink and paper for the purpose of making his will, by which, he said, “he should secure to Colonel Joseph D’Arcy the whole of his property by constituting him sole executor and residuary legatee.” The deceased, having written his will to the extent of nearly two sides of a sheet of letter paper, was obliged from exhaustion to stop, observing, at the time, “that he should complete it when his strength was sufficiently restored:” he then sent for Mrs. Holland—the mistress of the hotel—and her daughter; and upon their coming to his bed-side, he requested them to bear witness that the paper, which he had just written in the presence of Mr. Williams, was his will; that he then deposited it in a purple portfolio, and that he appointed Colonel D’Arcy sole executor, and residuary legatee. Upon their quitting the room he requested Williams to commit to paper the purport of such his communications, and to insert some directions as to his funeral; when this was done, the deceased further begged him to take it down stairs—to read it over to Mrs. Holland and her daughter—to obtain their signatures, and deposit it with Mrs. Holland, as instructions for her till the arrival of Colonel D’Arcy from Ireland. It appeared further, that, on the 12th of April, the deceased read over what he had written on the sheet of paper to Mrs. Holland and her daughter, repeated his intention in respect to Colonel D’Arcy, and expressed his conviction that the paper would take effect as his will. He made similar declarations to the waiter of the hotel.

*Lushington*—on an affidavit of the above facts, and on a proxy of consent from the deceased’s brothers, moved for probate of the two papers, as together containing the will of the deceased, to be granted to Colonel D’Arcy. The property, he said, would scarcely cover the debts, funeral, and testamentary expences.

*Per Curiam.*

The affidavit fully states a case that would entitle these papers to probate, if the executor should be called upon to prove them in solemn form of law; and with the consent of the two brothers—the only persons interested under an intestacy—the Court has no difficulty in decreeing probate to Colonel D'Arcy.

Motion granted.

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In the Goods of JAMES HARDSTONE.—p. 487.

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*On Motion.*

On renunciation of a co-executor, the Court will not grant administration with the will annexed, without justifying securities, to the daughter—the residuary legatee—during the lunacy of the mother—the other executor.

THE deceased of his will appointed David Jones and his wife Mary Ann Hardstone, executors, and residuary legatees in trust; and his daughter residuary legatee. He died in 1826. Mr. Jones had renounced; and it appeared that Mrs. Hardstone was a lunatic under confinement, and that there was no committee of her person or estate.

*Lushington* applied for letters of administration with the will annexed to be granted to the daughter (during the lunacy of the executrix) without the sureties in the bond justifying. He admitted the motion was rather out of the usual course; but that to grant it would be for the benefit of the lunatic: he further stated that in consequence of the daughter's minority, which only very recently ceased, no one had been willing to administer to the effects, and that she was unable to procure the necessary affidavit of justification. The property consisted of a policy of insurance for £1500, and a sum due from the business, in which the deceased had been a partner.

*Per Curiam.*

It is quite impossible, under the circumstances of this motion, that the Court can deviate from its ordinary rules; nor, even if it had the authority, could it safely make the grant without requiring the securities to justify. Suppose for instance this young woman should marry and the whole property be dissipated, what remedy could be afforded to the mother? No reason is assigned for the renunciation of Mr. Jones the executor; nor is the Court informed that any obstacle exists to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted; or the administration might go to the daughter as residuary legatee, but in that case the sureties would be required to justify. At all events the Court is bound to reject the present application.

Motion refused.

In the Goods of JOHN DUNN.—p. 488.

*On Motion.*

The deceased having, between instructions for, and the execution of, his will, delivered to his solicitor a letter of testamentary import to be put with his will; probate thereof decreed, as together with the formal instrument, containing the last will of the deceased.

JOHN DUNN, late of Bedford Street, Covent Garden, died on the 22d of April 1827. He left a son, a Major in the Army, and two daughters. On the 7th of February preceding he called at the house of Mr. Ottywell Robinson; and gave him verbal and written instructions for his will: a draft was accordingly prepared, read over to, and approved of by, the deceased. On the 6th of March, the deceased delivered to Mr. Robinson a paper sealed up in the form of a letter and superscribed, "Major Dunn, by favour of O. Robinson Esq. Argyle Street," which he desired might be put with his will. On the 11th of April the deceased executed his will; when it was sealed up, and together with the letter, enclosed in an envelope by Mr. Robinson, in whose possession it remained until the Testator's death; when the same was opened by Mr. Robinson in Major Dunn's presence, who himself read the letter, but without imparting to any one its contents. Major Dunn, the sole executor and residuary legatee under his father's will, proved it on the 13th of October; the letter, however, he did not prove, though it contained bequests of different annuities, which he regularly paid. (a)

In the month of December Major Dunn was accidentally killed: he died intestate, leaving a widow and one infant; and on the 9th of January 1828, letters of administration of his effects were granted to the widow, who had since taken administration (with the will annexed) *de bonis non* of John Dunn, as administratrix of the residuary legatee therein named.

*Lushington* prayed the Court to admit the letter to probate, as a codicil, though of a date anterior to the will.

*Per Curiam.*

It clearly was the intention of the deceased that this letter, written prior to, but delivered for the purpose of being put with, the will, should form part of his testamentary disposition. The executor followed its directions without taking probate of it, but that would not be a safe course for his widow who has only a joint interest with her child in the effects of her late husband. I shall therefore revoke the present administration *de bonis non*, and decree to Mrs. Dunn a *de bonis non* administration

(a) The letter began thus:

*Bedford Street, 28th Feb. 1827.*

My dear Son,

You will find I have left you my all, pray God send you may make good use of the same; and I trust for my sake you will be kind to my brother and my two sisters, and allow them each twenty pounds per annum during their life. Should Joseph Ramsey my nephew be living in my service when I am no more, do what you can for him. • You will find a deed with Mr. Binns wherein I am bound to give Mrs. Limbrey seventy pounds during her life.\*

\* The remainder of the letter was not of testamentary import.

with the formal instrument, and also with the letter annexed, as containing together the last will of the deceased.

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EDWARDS and EDWARDS v. ASTLEY and Others, and v. H. M. Procurator-General.—p. 490.

The presumption of law, that pencil alterations are deliberative, may be strengthened by circumstances;—such as, that the paper was originally carefully drawn up, and shows the deceased to have been a very precise man, while the alterations are incomplete and inaccurate, rendering the sense imperfect and the meaning doubtful.

FITZ-WILLIAM ROSIER was the party in this cause deceased; and the question that arose upon his will was—whether certain pencil alterations were cursory and deliberative, or final.

A decree had issued citing Mrs. Astley, as residuary legatee, and also citing different legatees; the decree was further served upon the King's Proctor, as it was alleged that the deceased left no relation.

*Lushington* and *Dodson*—for the executors, asked probate with all the pencil alterations.

*Phillimore* and *Nicholl*, contra—for Mr. Rosier—a legatee.

The *King's Advocate* on behalf of the Crown.

JUDGMENT.

SIR JOHN NICHOLL.

The paper propounded in this case is drawn up with great form and accuracy: each legacy is first expressed in words at length and then carried out into two columns, one specifying the amount of the stock (for the property is almost exclusively stock,) the other—of the annual interest:—each column is cast up at the bottom of the page and carried forward:—the pages are numbered and the words “in continuation” written at the top of each—and this plan is pursued throughout the whole instrument. Nothing then can be done with greater care, and the paper on its face exhibits in strong colours the cautious character of the deceased.

The will, as appears at the end, was originally intended to have been executed on the ninth of August, but the words “ninth day” are struck through, and the words “twenty-sixth day” substituted. The clauses “witness my hand” and “signed in the presence of each other” appear to have been written at the same time that “the ninth of August” was written: he afterwards signed his name and subjoined his place of abode; and from the appearance of the writing I infer that this was done when he altered the date—viz. on the 26th, though as I have observed, originally proposing to execute it on the 9th—and the conclusion I draw is that when he so formally signed it, not in the presence of any person, he had abandoned his purpose of having witnesses. That he wished the paper to operate in some form or other there is no doubt: indeed the only party claiming under an intestacy—the Crown—offers no opposition to the probate.

The real and only question then is, whether the instrument is to operate without—or whether the Court is to pronounce for it with—the pencil alterations. Part of those alterations is proved by the servant—Turner—to have been made on the first of September 1827,—the de-

ceased having died on the fifth. And I see no reason to doubt but that they were all made subsequent to the 26th of August 1826—it seems most highly improbable that they were there at the time of the execution whenever that took place—and certainly there is no proof that they then existed. The conclusion deduced from probability is confirmed by a conversation between the deceased and his intimate friend, Mr. Shepherd, on the 15th of August 1827, in which, speaking of the general contents of the will, he used this expression—“that he had made some alterations which he believed would not be material and that no difficulty could arise from them.” Now I think the alterations to which he thus refers on the 15th of August could not be those in pencil; but there are some trifling alterations in ink to which the remark would apply: from being a man of such accuracy he might be under some alarm even respecting these slight erasures; though not material it was natural enough for him to tell Mr. Shepherd that he had made them: but it is quite impossible to conceive that if these pencil alterations, which constitute the whole difficulty of the case, were then made, he should not have anticipated some confusion arising from them.

It is not unimportant that, in this conversation with Shepherd, the deceased expresses no dissatisfaction at what he has done—no opinion that his residuary legatee would have too little—but just the contrary—he had left her £10,000 stock—her children £24,000 stock—and he added “there would be some pretty pickings for Mrs. Astley after all;”—so that on the 15th of August he had no thought of diminishing the legacies in order to increase the residue.

The question then is, whether the alterations in pencil were final and decisive, or only deliberative and for further consideration: it must be remembered that they were made by this very accurate man—labouring under an acute and excruciating disorder—“an affection of the bladder of a most extensive nature” (as it is described by the medical man, Glen)—in the most depressed state of body—and within a short period of his dissolution;—that when Glen was first called in, the deceased had symptoms of apoplexy which were only prevented by cupping and other remedies;—that the usual effects of this complaint, especially if attended by great pain and exhaustion, are confusion of mind and forgetfulness. All these circumstances tend to support the presumption in favour of the will as originally executed: for *primâ facie* all pencil alterations are deliberative, and for this obvious reason; if they expressed the final intention of the deceased why did he not resort to a more durable material? This presumption in the present case is further strengthened by the fact that there are some alterations in ink, and there was no reason why he should not have employed the same material—he was in his own house—undisturbed—with every convenience at hand—engaged on the paper for four hours—and having it by his side for five hours more: surely if he had made up his mind he would have resorted to ink. This presumption, like all other presumptions, may be still further strengthened by circumstances; for instance, if the interlineations and obliterations have rendered the sense incomplete and the papers unintelligible, it would require pretty decisive evidence to convince the Court that they were intended to be final, more especially by a person of extraordinary accuracy when in health.

Here, on the second side, the bequest to Swanton is struck through in such a way as to become unintelligible—not as to the effect, for the

legacy would be pretty much the same as originally given, but as to the correctness of the language—it stands thus: the name and title—“The Rev. Francis Swanton” is crossed out; and yet immediately afterwards “the said Rev. Francis Swanton” is twice repeated: when there is no longer any such person; for the name has previously been struck through. Then again at the end of this bequest, the words—“together £600 3 per cent. Reduced Bank Annuities” are crossed out in the same manner: this is not at all intelligible—I cannot see why it was struck through—the whole bears the character of confusion of mind.

On the third side, in the legacy to James Rosier, the variation is much more material. In the marginal columns the figures 1000 and 30 are struck through, and 500 and 15 are interlined, while the body, where are the dispositive words, remains unaltered:—to which is the Court to adhere? Here again is something of a wandering and confused mind.

In the next clause there is a more extraordinary alteration. £1000 was given by the original dispositive words to each of James Rosier's children, and the sums carried out into the respective columns were 10,000 and 300. The body is now changed by an interlineation to 500 each, while in the margin the figures, instead of being 5,000 and 150, are 500 and 15. This again shows confusion and that he meant to revise—and is uncertain and unintelligible: an accurate man, if he had made up his mind to these alterations, would not have left them in that state. Then in the last clause of that bequest the words—“lapse legacy but be equally divided among the survivors”—are struck out, and the clause would now stand—“I desire that the £500 3 per cent. Reduced Bank Annuities shall not be considered as a”—which is perfectly unintelligible and a total want of sense. If any of the parties are dead what is to be done?—are the legacies to lapse or not? Now originally, as I have said, after he had made the bequests and carried them out into the marginal column, he cast them up at the bottom of each page; but though the particular bequests are here altered, yet the total is not.—All this bears the character of wandering—it is a sort of day-dream—of waking confusion, to which persons in that state are very apt to be subject.

Again, on the fourth side, besides that what relates to the money being the separate property of the Misses Edwards, and their sister, Mrs. Paget, during coverture is struck out; an interlineation of a legacy to their Mother occurs—that insertion has more the appearance and stamp of consideration and fixed intention: because at the bottom of the page, in order to include it, he alters the total casting up from 78,000 to 79,000, but even here there is confusion, for where it is separately written at the side the figures are only 79: and moreover he does not add the dividend of this £1000 to the sum total of the interest—it remains £2547, 10, instead of being 2577, 10. Even when he has altered 78 to 79 he does not carry it on to the next page—there the sum still remains 78,000. This shows it was not finished but left incomplete.

Again what becomes of the alterations in the former pages—for if they were permanent, the casting up in page 3 should, instead of 71,000, be turned into 61,000; or supposing the latter 500 to have been an error for 5000, then it should have been only 65,500 instead of 71,000—yet the total of that page is suffered to remain 71,000 and to be carried on and included in the next page—even where he changes the casting from 78,000 to 79,000.

All this shows either confusion of mind—which from his long illness and the near approach of death might well be the case; or it shows that these were mere passing ideas for further consideration and left in an incomplete and unfinished state, and afterwards abandoned altogether. This construction is further confirmed by what passed on the 4th, the day before his death. Shepherd and Glen had a conversation with him—he mentioned his executors—he told them where his will was: I do not infer from that that he intended it to operate with these alterations—if he had, he would so have expressed himself to Mr. Shepherd—but there was nothing of the sort—no allusion nor reference to them—no wish to finish them—no declaration that he had made and wished them to be acted upon in the state in which they were: “he hoped his testamentary dispositions would be satisfactory to his friends.”—Just however as Glen had left the room the deceased recollected himself, and when Shepherd had called him back the deceased said—“he thought he had not left sufficient to his servant Philip Turner—he wished him to have 500%.”—and he had before, on the 15th of August, mentioned to Shepherd that he intended to give him this increased benefit. If the alterations were not deliberative, and if he had not purposed again to revert to this instrument, he would have made this addition to Turner’s legacy when engaged in the paper for four hours on the 1st of September: but he neither does that, nor does he, on the 4th, say one word about the pencil alterations, and therefore it is to be inferred that, incomplete as they are, he had abandoned them altogether, and probably forgotten their existence. This is the legal presumption, and this is the probability of the fact deducible from the circumstances of the case.

Upon the whole the paper appears to have been originally drawn up with great care and attention. The Court has every reason to feel certain what the intention was on the 9th of August—finally confirmed when he subscribed it on the 26th of August 1826; but it has no satisfactory information that the changes which in the wanderings of illness—on the 1st of September 1827—he projected, were any thing more than transient and deliberative. The Court therefore pronounces for the paper without the pencil alterations.

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### In the Goods of DONNA MARIA DE VERA MARAVER.—p. 498.

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#### *On Motion.*

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Probate of the will of a married woman, a native of, and domiciled in, Spain, granted according to the law of Spain, to one of her sons as executor, on affidavits as to the law of Spain, and the identity of the parties.

THE deceased, a native of Spain, died at Seville in November, 1820. On the 22d of November, 1815, she executed her last will and testament; and therein, after stating that she had particularly expressed to Don Martin Saravia, her husband, every thing relating to her will (since, “in consequence of her numerous occupations, time did not permit her to ordain her last will and testament so extensively and with such formality as was required”) she gave to him her right power and faculty in the most ample way according to law, either should he die

before her, or survive her, and in case he should be prevented from doing so, she then conferred the same power upon their lawful sons, collectively or individually, to declare her last will and testament, and order what she commanded. She appointed her husband and her sons executors.

In the month of April, 1821, Don Saravia, the husband, attended before the proper authority in Seville, and accepted, declared, published, and formalized the will of his late wife; and ratified her appointment of executors. He died in August, 1827. Upon his death, a power of attorney—by which Messrs. Mastermans had, since 1819, received the dividends upon certain stock (now consisting of more than 3000*l.* new 4*l.* per cent annuities) standing in the name of Donna Maraver (wife of Don Saravia)—ceased; and, in order to sell out that stock and receive the dividends that had accrued since the death of his Father, (Don Cayetano Saravia,) one of the sons and a surviving executor, had come to England for the purpose of proving the will(*a*). Affidavits were exhibited as follows:—

“Appeared personally Don Cayetano Saravia of Seville in the kingdom of Spain and (by the sworn interpretation of William Renell of London merchant) made oath that by the laws of Spain—with which at least, in so far as they relate to the matters hereinafter mentioned, he this appearer is well acquainted—the fortune or property of a Spanish lady on the occasion of her marriage (unless she expressly declines having any settlement) is inventorized and valued, and such inventory and valuation is signed by her intended husband and the amount thereof remains vested in the wife, and must, at her decease, be made up and paid by the husband to her executors or heirs; that the husband and wife, during their joint lives, are with respect to their property, in a state of co-partnership, and the husband in case of his wife’s decease, is also answerable to her executors or heirs, for a moiety of such profits or increase of their joint property (called *Gananciales*) as may have arisen during their cohabitation; that the wife has full power and authority to make her will as a feme sole, or, as is frequently the custom in Spain, to empower any other person to make and declare the same for her; but, in either event if she leave a child, she cannot bequeath to her husband, or to any other person a larger proportion than one fifth of her estate, and the remainder thereof must descend to her children; but that if she has no child, she may bequeath her property to her husband or to others as she may choose. That in the event of a wife dying intestate the whole of her property, real and personal, would go to her children, or, in default of them, to her next of kin to the entire exclusion of her husband. That the deceased, Donna de Maraver, in conformity with such laws, had and enjoyed a considerable fortune as a feme sole notwithstanding her coverture; and in November 1815 duly made and executed her last will and testament in writing, and appointed her said husband to make and declare the same; that the utmost extent of the power which could be derived by him in consequence of such appoint-

(*a*) It appeared that Don Cayetano had a power of attorney from his co-executors authorizing him fully to act on their behalf, and to take any measures that might be requisite for receiving the effects of the deceased in England, and to appear for them in any Court for that purpose. This power of attorney was before the Court.

ment was that he might annul alter or revoke so much of the said will as related to the disposition of one fifth part of her property; but that having once made declared and formalized the instrument to be the last will and testament of the deceased he could not afterwards, in any manner, alter or revoke the same." The affidavit further stated, "that Don Saravia had declared and formalized the instrument executed by his deceased wife to be and contain her last will and testament, and had confirmed the nomination of his sons as executors." (a)

There was also an affidavit, as to the identity of Don Cayetano Saravia, from the Messrs. Renell of London merchants, to whom, about the end of March last, he brought letters of introduction and recommendation. In conformity with the directions of the Court, when this case was first mentioned, the principal clerk in the house of Masterman and Co. made an affidavit that Masterman and Co. had been satisfied (b) that Don Cayetano Saravia, the present applicant, was authorized to receive the dividends that had become due upon the stock in the name of Donna de Maraver; and they had accordingly paid over the same.

Upon these affidavits and documents *Addams* moved for a general probate to Don Cayetano Saravia.

Motion granted.

(a) The above affidavit, so far as it related to the laws and customs of Spain, was certified by the Consul-General for Spain to be correct.

(b) By the letters of introduction from their intimate friends at Seville—by the letters of Don Cayetano to his wife and family at Seville, and by the remittances, to his relations there: all which had passed through their hands.

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### KING and THWAITS v. FARLEY.—p. 502:

A testator, having, ten years before his death when in perfect health, executed a will and subsequently a codicil conformable to his ascertained affections—and 2½ years before his death, after a paralytic stroke producing at least great *bodily* infirmity, having executed a second codicil materially departing from those instruments, and, six months before his death, a third codicil revoking the 2nd and reverting to the former disposition—probate of the will, 1st and 3rd codicils granted—there being no satisfactory proof of a change in his affections, and the evidence of volition and capacity being at least as strong in support of the 3rd as of the 2nd codicil.

THIS case was argued by *Lushington* and *Dodson* for King and Thwaits the executors; and by *King's Advocate* and *Nicholl*—for Miss Farley.

#### JUDGMENT.

SIR JOHN NICHOLL.

The deceased, George Lowdell, died on the 2nd of March 1827, leaving one brother and the children of another; but he seems to have kept up no intercourse with any of his relations. His property, though the amount does not exactly appear, was considerable and of various kinds.

The present question arises on two codicils, and the Court must in some measure consider the *factum* of both.—The former is revocatory of part of his will; the latter, except as to a few small legacies, revokes the former and reverts to the will. The will is dated on the 6th of March 1817—is all of his own handwriting—is carefully and formally

drawn—is signed and sealed—and is attested by three witnesses, his neighbours at Great Bookham, one of them Bennet Hollobrook, who afterwards appears to have been his intimate friend: it appoints Watts, Lintott and Willard, his executors—it directs the payment of his debts—it gives legacies to servants and some others out of his long annuities, and then disposes of the rest of the long annuities—it gives legacies to other servants in addition to their wages—it bequeaths certain sums in trust for charitable purposes—it leaves his medical books and instruments to Mr. Baker—it gives certain joint property specifically to Watts—then, after enumerating several estates, it bequeaths them specifically to Mrs. and the two Miss Thornton's as joint tenants—and also gives them the residue as tenants in common:—"The rest and residue of my property of what kind soever and wheresoever, I give to and bequeath to the said Sarah Thornton, widow, Elizabeth Mary Thornton and Mary Thornton spinsters share and share alike as tenants in common, and not as joint tenants to hold to themselves their respective heirs, administrators and assigns for ever according to the nature of each respective estate or property."

Whether this latter part and these specific bequests constitute the bulk of his property, or whether the specific bequests exceed the residue I am not informed; but however that may be, the Thornton's are especially benefitted. Mrs. Thornton afterwards died in the deceased's lifetime; her third of the residue would consequently lapse and go to the next of kin.

This will, so carefully and deliberately made, leaves no doubt what the testamentary intentions of the deceased were in 1817—the Thorntons then were the objects of his bounty—the Farleys, of whom we afterwards hear, were not even mentioned—his medical friend and neighbour, Mr. Baker, had his professional esteem and regard—his old and intimate friend Mr. Hollobrook is one of the attesting witnesses of this will as well as of the last codicil.—The will is in no degree in contest between the parties—here then is a safe and solid foundation of testamentary intention, a point of support on which to rest—a solemn declaration, which is in accordance with the deceased's history.

He was of a very advanced age, above eighty—had formerly been a medical practitioner in the Borough, but for many years had resided at Great Bookham in Surrey—he had been married, but his wife had been dead several years without issue: during her lifetime and after her death he had been particularly intimate with the family of the Thorntons, who resided at Kennington. Mr. Thornton died leaving a widow and two sisters; one of whom afterwards married Mr. King an executor—and the deceased, when he came to town to receive his dividends, used frequently to stay at their house at Kennington for a week at a time; and they were accustomed in the summer to spend some weeks with him at Bookham. Under this long intimacy and no intercourse with his own family, it is not extraordinary that they became the principal objects of the deceased's bounty, and accordingly these three ladies were his residuary legatees.

In the beginning of 1819 the deceased had a violent attack of paralysis which nearly deprived him of speech and of the use of his right side—his testamentary capacity however must be considered to have remained, because there is a subsequent codicil not questioned. This codicil, dated on the 9th of November 1822, revokes the appointment of Willard and

Lintott, and substitutes William King, (who I suppose in the mean time had married Miss Thornton) and Thomas Thwaits, as executors, and gives to each of the latter 100*l.*: it is signed and sealed; and the name is so well written that he can hardly have been obliged, at that time, to use his left hand—it is attested by whom?—by the Rev. William Farley—Curate of the parish:—by Hollobrook:—by Bradbury, the tailor; and also by Baker, the surgeon. The validity of this codicil not being impeached, testamentary capacity up to that time—November 1822—must be admitted; and here are in confirmation of it, the Rev. Mr. Farley himself—Mr. Hollobrook—and Mr. Baker, besides Mr. Bogue, the drawer, and Bradbury the attesting witness. It is, as executors under that paper, that King and Thwaits are parties before the Court, opposing a codicil of December 1824, and setting up a still further codicil of November 1826.

To the end of 1822 then, the deceased (as must be presumed) continued competent to the performance of a testamentary act notwithstanding the paralytic affection, and at all events the intention of giving the Thorntons, not only the property specifically bequeathed to them, but also the undisposed residue, remained unchanged: while on the other hand there is no intention, manifested up to this time, of benefitting the Farleys.

In March 1823 he suffered a second paralytic attack; and from that period, if not before, his bodily infirmities were very great—he had lost the use of his right side and hand—he could barely sign his name and that with his left hand—his speech was almost entirely gone—he could only utter monosyllables—yes and no: as persons in that state usually are, he was very irritable and nervous—irritable at being misconceived or not understood—nervous, so as to be in tears, when any agitating matter was going forward. Whether his condition was much changed by this second seizure from what it was after the first, is not very clearly ascertained. Four years elapsed between the first and second attack, and four years more from the second to the time of his death; and it is to be observed, as a matter of experience in this Court, that when witnesses come to speak to the condition of a person some time afterwards, they are apt to confound what passes at different periods. It was however within the latter period—after the second paralytic stroke—that both the instruments, in dispute in this cause, were made.

On the 29th of December 1824, a codicil was executed by the deceased and attested by three witnesses, revoking the residuary bequest to the Thorntons, and giving to the Rev. William Farley 100*l.*; to Mrs. Bogue 200*l.*, and to Jane Farley the residue. On November 18, 1826, another codicil was executed by the deceased and attested by four witnesses, revoking the codicil of December 29, 1824—again giving to William Farley 100*l.*; to Mrs. Bogue 200*l.*; and to Jane Farley—instead of the residue—200*l.*; and otherwise confirming the will of 1817,—a confirmation this of his testamentary bounty in favour of the Thorntons. Each of these instruments must be proved—for if neither is proved, the will of 1817 with the codicil of 1822 remains unaltered.

So far as respects the capacity of the deceased, these two codicils stand upon nearly equal ground:—no material change in his condition had taken place—he was much in the same state in December 1824 as in November 1826, and he lived near four months after the latter period: true, he had lost the use of one side and could only utter monosyllables, but to the end

of his life he was drawn about in his pony-cart, wherever he directed: he signed letters and drafts—he counted money—he understood questions and answered them—he played at cards—he certainly was in a very miserable state of body, but his mental faculties were not gone—he was capable of volition and intention;—but it would require very clear proof of intention to support the first of these two codicils. If Baker is right he had not capacity at either time—and then, neither paper ought to be established; but that is not an opinion supported by a just view of the facts—nor one on which, I presume, Miss Farley will much rely.

What, then, is the proof to establish this codicil of December 1824, and to take away the residue from the Thorntons, to whom he had been so long attached? Mr. Farley had been Curate of Bookham about eleven years—he kept a school there—and his sister resided with him: as a neighbour he attested the codicil of 1822, but his name does not occur in the disposition then made. During the latter years of the deceased's life (for so it is laid in the plea) Farley and his sister visited him—showed him kind attentions—played at cards with him, and Miss Farley gave him her trumps. Hence, though the deceased seemed fond and pleased,—though there was a growing partiality, particularly towards Miss Farley—yet all the intimacy arose, and the whole regard was acquired, after this poor creature became a complete paralytic. These kindnesses might account for giving them little legacies, as he had done to others; and here are two documents, E and F, which seem as if such a thing was intended. Paper E contains a list of sums from 100*l.* to 1000*l.*: it is headed “Mr. Farley,” and thus proceeds:—

Legacies to be paid	3 months +
in	6 months
100 <i>l.</i>	12 months
Mr. Farley	one hundred pounds
+	
Mrs. Bogue	two hundred pounds
+	three hundred pounds
+	400 <i>l.</i> Miss Farley.

The remainder of this paper is immaterial. This instrument, therefore, proves that at the time it was drawn up he was unable to express or explain himself in any other way than by a cross, but it also proves that he did intend to benefit these parties to a certain extent, and consequently paper F, a draft of a codicil, is prepared in exact conformity with E; but it has no date, and does not appear to have been executed.

“This is a further codicil to the will of me George Lowdell of Great Bookham in the county of Surrey Esquire I give and bequeath unto the Reverend William Farley of Great Bookham aforesaid Clerk the sum of 100*l.* Also I give and bequeath unto Jane Farley of Great Bookham aforesaid Spinster Sister of the said William Farley the sum of 400*l.* Also I give and bequeath unto Elizabeth the wife of James Bogue of Guilford in the county of Surrey Gentleman the sum of 200*l.* which said legacies of 100*l.* 400*l.* 200*l.* I direct to be paid within 3 months after my decease And in all other respects I ratify and confirm my said will in witness &c.”

There is not in the cause any account whatever of these preparations for a codicil: the Court is left quite in the dark, when they were drawn

up—why they were not executed—how and for what reason the deceased's purpose was changed and so material an alteration made. Mrs. Sheriff, his housekeeper, went with him in his pony-cart to Bogue's for the purpose, as she understood, of giving legacies to the Farleys—this is conformable to the last codicil and does not support the codicil of December 1824—and though these papers are strong to show that the deceased intended to give away from the Thorntons pecuniary legacies, there is not the slightest symptom that a thought of revoking or transferring the bequest of the residue had ever shot across his mind.

To account for this departure from the original disposition of the testator's property, Miss Farley has introduced in her plea many charges of violence and of ill treatment on the part of the Thorntons towards the deceased, and has alleged a great quarrel in consequence: but it does not appear from the evidence that there was any great quarrel with which the codicil of December 1824 had any connection—there was no separation—there were little bickerings, such as were natural with an irritable, penurious, obstinate, old man—between eighty and ninety—labouring under great infirmities and wearying out his attendants; but nothing that did not soon blow over, nor was the intercourse ever broken off. It is true that at one time the deceased gets up after he has gone to bed and insists on Peter's sleeping in his room instead of Quelet—he stands on the stairs in his night-shirt—they endeavour to persuade him to go to bed again, but persuasion being of no avail they carry him back: this is merely out of kindness properly exercised—a very fit interposition; but it does not show that the deceased was not a free agent at other periods and on other matters. Again it was said, that the deceased being very penurious wished to reside at Kennington with the Thorntons, and that they declined to receive him, that in consequence he was exceedingly angry and offended; but the story is so blind and dark that it does not render probable this important variation:—if it were true to the extent represented—if his affections were completely alienated and transferred to Miss Farley—he would have broken off all communication with the Thorntons and revoked the specific bequests as well as the residue—but no such thing—his intimacy still continues and the specific bequests remain part of his will.

If there is nothing then *à priori* to render the alteration probable, what is the proof of the *factum*? All that has been done in support of it is the production of the attesting witnesses—three tradesmen at Guildford called in by Bogue and who see the deceased subscribe—but nothing more. The codicil is not read over in their presence and the deceased scarcely utters a word.

This is a total failure of proof: it would be quite contrary to all experience and practice to pronounce this sufficient proof. If a man is in full possession of his faculties and the execution takes place in the presence of three witnesses, the presumption is that he knows and intends what he is doing; but when it is the act of a man in such a state and at variance with all his former ascertained intentions, such evidence weighs nothing at all. Bogue alone could have proved what would have been satisfactory to the Court, but Miss Farley has not ventured to produce and subject him to cross-examination:—she has been content with her own cross-examination by one single interrogatory, and that is so general,—that it amounts to nothing—he merely says—that he drew the codicil from instructions given by the deceased and was satisfied that he

intended to make this disposition. In ordinary cases perhaps this might be sufficient; but as the deceased was in so wretched a condition it was necessary to lay the circumstances before the Court to show that such means were used, that the deceased could not misapprehend the nature and purport of the instrument. The proof then in support of the codicil of December 1824, supposing there were no revocatory codicil, is extremely slender, considering the infirmity of the deceased's faculties and the strong presumption against the revocation of the disposition contained in the will of 1817 as already set forth. It is pleaded, that in 1825 the deceased delivered this codicil to the brother, William Farley; of that no evidence is offered; they have not ventured to produce him, though he has no greater interest under one codicil than the other: the history therefore of this codicil and of the possession of it is much in the dark.

In the summer of 1826, Mrs. Sheriff's health having been much impaired by nursing the deceased, she was absent for six weeks or two months; and Miss Thornton came to the deceased's house to superintend the family during her absence. Miss Farley, who was acquainted with this codicil of December 1824, seems to have interfered in the domestic arrangements and to have had some quarrel with Miss Thornton, because Mrs. Sheriff states on her return she found matters in confusion. This part of the history is left rather in obscurity: how the existence of this codicil was first known either to Thornton, or to Sheriff, or to the deceased himself, there is no evidence, but the fact is quite clear that there was a considerable quarrel between the Farleys and Miss Thornton: how brought about does not appear—whether the deceased remembered it and repented of the codicil, or whether it was suggested to him;—but not only did intercourse with the Farleys cease, and were they excluded from his house, but in the autumn he was anxious to do something about the codicil of December 1824, and Peters, his servant, deposes, that the deceased desired to be driven to the house of Mr. Hart: and while it is pleaded by Miss Farley that custody and controul were both exercised over him, the fact is clear that he drove out in his pony-chaise as before—that he passed Farley's door constantly and never called—and that, (with the exception of the Farleys,) his friends and neighbours—different families—visited him as before: so that he was neither kept at home in custody nor controlled as to where he should go; and the evidence is pretty strong that he was at no time a person who would readily submit to be controlled.

It is quite manifest that he became much dissatisfied with Bogue, and very anxious about some new testamentary act after finding out the contents of this codicil: he seems to have supposed that Mr. Bogue had at least misapprehended his intentions, if not too readily furthered the Farley's wishes; but assuming that he well knew and understood the contents of that codicil and that it was executed under some temporary impression, and that of this there was full proof, is it at all extraordinary that he should revert to his former will? Such a return would be much easier of proof than the former departure: it was natural enough that on reflection or explanation or even on remonstrance he should gladly and readily revert to it.

Accordingly on Saturday, October 24, he set off in his pony-chaise and made his servant drive him to Dorking to the house of Mr. Hart—a solicitor residing there—a witness produced by Miss Farley, and who

has acted fairly and given fair evidence. The deceased could not articulate, nor make himself understood, further than that his visit had some reference to his will, and the interview ends by a proposal from Hart to call on the deceased at Bookham the following day. This visit to Dorking is not immaterial as showing that the deceased had an intention to make some alteration when not in the presence of those usually about him, and that he was not a mere instrument in their hands.

On going the next day to Bookham and meeting Mr. Thwaites, Hart had no better success and made but little progress in understanding the deceased. There the matter rested for a time; but Bogue—having been staying a few days with the deceased at Bookham,—before he went away on the third of November, delivered to him copies of all the codicils he had ever drawn for him; and on the 16th of November Hart being sent for, again went over to Bookham; and he did then arrive somewhat nearer to the deceased's wishes. A draft of the will of 1817 was produced and read over to the deceased: when they came to the residuary clause, he was asked—if he had made a codicil giving Miss Farley the residue and if it was agreeable to him; he appeared affected—he shook his head—and cried, “No, no.” Here then, from Miss Farley's own witness, is pretty strong evidence that the deceased—unless he was idiotic, which is contrary to all the evidence—was dissatisfied with the codicil of 1824; and that if he had possessed the power of utterance, he would have got it revoked when he first went to Hart's. Hart then proposed, and the proposal was acceded to, and adopted, that Bogue should attend on Saturday, November the 18th, as well as Mr. Baker, the Surgeon, and Mr. Thwaites, the executor,—all disinterested witnesses in respect to this codicil.

Accordingly on the 18th of November they met, and Mrs. Sheriff and Miss Thornton were also present. The papers, D, E, F, and G, copies of the several testamentary instruments, were then produced, and Hart read to the deceased, G—the copy of the codicil of December 1824. He deposes, that “the deceased listened very attentively, till he came to the clause giving the residue to Jane Farley, the deceased then shook his head and hands, and in a crying tone of voice, said ‘No, No,’ and appeared to be affected and in tears.” This is Hart's own account, and if the deceased had any intellect and was not completely deprived of understanding, this evinced a wish and intention to revoke that disposition of the residue. Mr. Hart very properly does not trust to his mere reading—he repeats it in the way of explanation, and again asks, “if it was the deceased's intention to give the residue to Jane Farley.” “The deceased again shook his head, cried, and said ‘No, No,’ appearing much hurt.” Hart then enquired, “where the codicil was;” and, being told that it was in the hands of Jane Farley, asked the deceased, “if it was his wish the codicil should be obtained from her. The deceased immediately nodded assent: deponent said he and Bogue would go to her—deceased again nodded, and, as deponent thinks, said—Yes, Yes, Yes.” Here is the absence of speech, but here is intelligent assent and dissent—approbation and disapprobation—as to what is read, to what is explained, and to what is proposed: he understands the drift of questions. Hart and Bogue go to Miss Farley and demand the codicil—she denies having it—the brother is present;—but I will not rest on this part of the case—the codicil cannot be obtained, and they return without it. The Rev. William Farley overtakes and enters the house with them,

and begins making an accusation against the parties present. A great altercation and much noise ensue—the poor speechless testator can do nothing but shed tears, and Farley at length retires. Hart expresses a wish to decline making the codicil and goes away as he deposes—“having previously stated to Mr. Bogue that he, or any other person who understood the deceased better, might do so if they thought proper,” so that he does not protest against the deceased’s capacity, and caution those present not to proceed; on the contrary his objection only arises from his doubt of understanding the deceased; and he quite negatives the very plea of Farley by whom he is produced: for on the next article he states:—“He cannot depose that the deceased was incapable of the management of himself and his affairs, and was not a free agent. .... The deceased did not appear at all intimidated—not in the least; and his understanding appeared to be good then as well as on the previous occasions on which he had seen him; for deponent saw him on three occasions prior to the aforesaid 18th of November.”

Here then is Miss Farley’s own witness, and a person whose conduct appears to have been cautious and sensible, proving from the conduct of the deceased, understanding and volition, and confirming, with his own opinion, and from his own observation, that the deceased was not intimidated or imposed upon, but was both a free and a capable agent.

Mr. Bogue gives nearly a similar account, varying in some instances as to particular circumstances, but in nothing that affects the credit of either. Baker also in part agrees with one, in part with the other; but all concur in substance, especially on the important point of the intention and conduct of the deceased. Bogue’s evidence is, in some respects, even stronger than Hart’s. For instance, he says—the deceased himself pointed to Hart and the deponent as the two persons to go and demand the codicil of Miss Farley—that the deceased waived his hand to Farley to quit the room;—and in some few other particulars: but it will be sufficient to revert to him for the sequel, to observe what precautions he took, after Hart’s departure, to ascertain the volition and capacity of the deceased.

Bogue deposes—“That when Hart had left the room either Mrs. Sheriff or Miss Thornton or Mr. Baker, or they conjointly, requested deponent to make a new codicil revoking that of the 29th December 1824.”

There was no impropriety in their then requesting Bogue to make the codicil, for they had been present in the room all the time and knew what the deceased’s wishes were. Bogue at first declined because he thought he had offended him: they at length prevailed on him; and this is the account he gives of the transaction:—“Deponent—taking either the copy of the codicil of the 29th December, 1824, already on the table, or the draft of it—which he had brought with him—said to the deceased—Do you mean to revoke the legacy to the Reverend William Farley of the sum of 100*l*.’ to which the deceased answered distinctly ‘No.’ Deponent then asked him ‘whether he wished to revoke the legacy of 200*l*. to deponent’s wife.’—‘No.’—‘Whether he intended to revoke the bequest of the residue of all his property to Miss Farley’—he replied in a distinct manner ‘Yes.’—‘Whether he would not give her something’—‘No.’ Miss Thornton then asked the deceased to give Miss Farley 200*l*. upon which he said ‘Yes,’ or by a sign signified his assent. She

then asked him, 'Whether he would not leave something to his nephew:' to which he answered 'No.' "

If a will can be made by interrogatories—unless there be something in law to prevent instructions being received in this manner—here is the strongest proof of volition, discrimination, and capacity, particularly, taking it in conjunction with the fact, that the deceased's mind had been previously known. Bogue then asked the deceased, 'Whether Thwaites should continue in the room while the codicil is prepared;' and he answered 'Yes:' and in this there was no impropriety:—Thwaites was a friend of the deceased's, and perfectly disinterested. Bogue continues:—"While he was drawing up the codicil, he asked the deceased, whether he intended to revoke the appointment, he had by a prior codicil made, of the deponent as an executor; the deceased answered thereto by taking the very codicil containing such appointment and throwing it into the fire.—When the deponent had finished the draft, he read it over to the deceased, and asked him, 'whether it was right:' the deceased said 'Yes.' He afterwards read the copy all over to the deceased, and put the same question—to which the deceased replied 'Yes.' "

So here are two readings over. The witness then speaks to the execution of the codicil, and to the testator's capacity: as to his capacity—in these terms:—

"The deceased was unable to converse: he only uttered monosyllables, or little more; but he had every faculty, as deponent believes, except the faculty of speech; that he recognized every person who came into the room; and nodded, when they inquired after his health."

At least this is as good evidence as on the former codicil, and his reverting to the disposition of the will is more natural than the departure from it. But I do not wholly rest on Bogue for this part of the case; here is Baker the medical attendant, as I have already noticed, who, after speaking to the facts, says:

"He believes it was the deceased's intention to make an alteration in the disposition of the residue of his property, and to revoke the codicil of the 29th of December 1824, and that the deceased understood and approved of the codicil of the 18th of November 1826; but he does not believe that the deceased was on that day of sound perfect and disposing mind, memory and understanding."

This opinion will not much serve Miss Farley's case: but looking at the facts stated by Mr. Baker, on which the Court must form its own opinion, the intelligence and volition seem sufficient for giving effect to the particular transaction. Considering the former disposition—his long affection for the Thorntons—his quarrel with, and estrangement from, the Farleys in the summer of 1826, it was to be expected that he would revert to his original purpose. His old and intimate acquaintance, Mr. Hollobrook, corroborates this detail of the facts:

"Bogue read the codicil in the hearing of all present, and then asked the deceased, 'Will you leave Miss Farley 200?'"—to which he answered in a firm tone 'Yes.'—"Will you leave Mr. Farley 100?'" 'Yes.'—"Mrs. Bogue 200?'"—"Yes."—Bogue then enquired, 'whether he wished to leave any more:'—to which he answered, 'No:'—"that is, then reverting to the will. The witness continues, "that on the day and at the time of the execution of the codicil the deceased was of sound mind memory and understanding, and, as far as his mind was required

to act, was as capable of doing that or any other serious act requiring thought, judgment, and reflection, as ever he was."

Now, upon the evidence already quoted, there is sufficient for me to pronounce that the codicil of 1826 is proved: there is no clandestinity in the transaction: Hollobrook, who attested the will of 1817, is, the day before, requested to attend for the purpose of being a witness. Mr. Baker is also appointed to be present, and Bradbury is asked to be a witness: there is no appearance of any urgency in any part of the business. The Court ought also to recollect that the deceased was not then at the point of death—he lived four or five months longer, Miss Thornton staying with him—he acting as before—driving out in his pony chaise—signing letters—signing drafts—playing at cards.

Upon the whole there can be no doubt that before his mind was in any degree affected, *viz.* when he executed the will in 1817—it was the fixed and decided intention of the deceased to give the bulk and residue of his fortune to the Thorntons; and that before any alteration was made in that disposition, he had suffered two severe paralytic attacks. The codicil made in favour of Miss Farley is not sustained by any satisfactory evidence of a rational change of affection or of intention in that respect; but assuming that the evidence is sufficient, the codicil, revoking the altered disposition of the residue and reverting to the former intention, is at least as strongly—in fact much more strongly—sustained.

The Court therefore only grants probate of the will, of the codicil of 1822, and of the codicil of 1826: but, under the peculiar circumstances of the case, I shall not give costs.

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## Trinity Term.

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### ARCHES COURT OF CANTERBURY.

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#### BROWN v. BROWN.—p. 523.

To found a sentence of nullity by reason of impotency, the impediment must be shown to have existed at the marriage, and to be incurable:—impediment not proved incurable. *Semble* that an impediment not natural but supervening is no ground of nullity.

THIS was a cause of divorce, by reason of cruelty and adultery, promoted and brought by Elizabeth Brown wife of John Brown of St. Ives in the county of Huntingdon. The marriage took place on the 3d of November 1825, and on the 12th of October 1826, the parties separated.

A libel consisting of twenty-two articles with two exhibits annexed, was admitted without opposition. To this libel a negative issue was given, and three witnesses were examined as to the fact of marriage. An allegation (of eleven articles with an exhibit) on the part of John Brown was, after debate, admitted as reformed. It alleged, that although a marriage was in fact had and solemnized between the parties, they never lived and cohabited as man and wife "by reason of some na-

tural impediment and incurable malconformation and bodily defects which cannot be removed by the art or help of Physicians and Surgeons [as by the judgment and inspection of matrons and other lawful proofs to be made in this cause will manifestly appear.]”(a) The prayer of this allegation was, “that the marriage might be pronounced to have been and to be absolutely null and void from the beginning.” On behalf of Mrs. Brown this allegation was counterpleaded and contradicted: and witnesses having been examined on both sides, the cause, at petition of both Proctors, had been concluded as to the fact and validity of the marriage.

#### JUDGMENT.

Sir JOHN NICHOLL.

Mrs. Brown was past the age of child-bearing at the time of the marriage: therefore the primary and most legitimate object of wedlock—the procreation of issue—could not operate; and a man of sixty who marries a woman of fifty-two should be contented to take her “*tanquam soror*.” But here there is a failure of proof on both the points which it was incumbent on the husband to establish: first, that there was an impediment to consummation, existing at the time of the marriage; and secondly, that that impediment was incurable.

It was pleaded, indeed, in the husband’s allegation that the disease was natural and incurable: had it been stated that, though incurable, it was merely a supervening defect—the not unusual attendant of advanced age—and in a woman past child-bearing, I do not know that the Court would have admitted the plea at all: for I have yet to look for an authority that would set aside the marriage even if these facts, now insisted on as sufficient to found a sentence of nullity, were held to be proved. But in my opinion, they are not proved: more especially as to the disease being incurable. Mr. Copeland, ten months after the marriage, afforded her some relief; the cure was in progress when he ceased to attend her; and Mr. Okes, a Surgeon of Cambridge, and two experienced women, who both have had large families, are of opinion that the obstruction is removed.

Without therefore deciding any thing as to the other branch of the case, I shall confine the expression of my opinion to this: that the husband has failed to prove the disease incurable: and shall leave the wife to proceed with the suit for adultery, recommending however that the parties should come to some arrangement. The legality of the marriage is established by the Court pronouncing, that the husband has not proved his allegation.

(a) The passage between brackets was struck out before the plea was admitted: the Court observing, that as it appeared from the allegation, Mrs. Brown, more than once since the marriage, had submitted herself to the inspection of Surgeons, the Court would not direct a further examination.

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HAWKES v. HAWKES. (a)—p. 526.

Alimony *pendente lite* is usually about one-fifth of the annual income: but the proportion may vary according to the circumstances of the parties.

(a) Vide *suprà*, p. 79.

THIS was a cause of divorce brought by the husband against the wife. The present application respected an allowance of alimony *pendente lite*. The *King's Advocate* and *Haggard* for the husband. *Lushington* and *Pickard* contra.

## JUDGMENT.

SIR JOHN NICHOLL.

The husband's income is admitted to be nearly 1700*l*. Now though the wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation: she is as it were under a cloud, and should seek privacy and retirement. These Courts have in such cases been generally disposed to consider, as a fair medium, about one-fifth of the net income, but they have allowed their decisions to be regulated by, and to vary according to, circumstances: the husband, for instance, must have a larger proportion, if his rank and condition require more to support them. Here the income arises out of pay; and consequently, first, it is of uncertain duration; the Court would therefore not grant so large an allowance as if it proceeded from substantial property: secondly, it is given him expressly to compensate his services and to meet his expenses (which must be heavy) as an officer—a captain of cavalry on an East India station: this furnishes another reason why a smaller proportion should be allotted. Again, he has three children for whose maintenance and education he must necessarily make remittances to this country,—that is always a further circumstance that operates in the consideration of these questions.

It appears that, previous to the wife's alleged misconduct, the husband allowed 400*l*. per annum for the maintenance of his wife and children: my mind has been fluctuating between 200*l*. and 250*l*. per annum; but I have decided on allowing her 250*l*., considering that, during the progress of the suit, there has been no appearance of a disposition to proceed vexatiously: on the contrary, by admitting the answers of the husband's attorney—his brother—to the allegation of Faculties, much delay which would have arisen, since the husband is in India, has been prevented. I allot alimony at the rate of 250*l*. per annum from the return of the citation.

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ON the third session the Court pronounced the case fully proved, and signed the sentence of separation.

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## DURANT v. DURANT.—p. 528.

IN a suit for divorce brought by the wife, repeated and profligate adultery being proved on the part of the husband, (who, however, had to maintain and educate twelve children) permanent alimony at the rate of 600*l*. per annum, (in addition to 120*l*. per annum separate property) out of a net income of 4,000*l*. allotted from the date of the sentence—three years before; the cause having in the interval been carried by appeal to the Delegates but remitted, no steps being there taken by the Appellant, and the remaining delay being occasioned by his absence from the kingdom.

THIS was a suit of divorce instituted by Mary Ann Durant against George Durant, her husband, by reason of his adultery.

The *King's Advocate* and *Haggard* now applied to the Court for an allotment of permanent alimony under the circumstances stated in the judgment.

JUDGMENT.

Sir JOHN NICHOLL.

The present application is for the allotment of permanent alimony. The suit has been long depending—the original citation having been taken out from the Consistorial Episcopal Court of Lichfield and Coventry, in January 1820. The husband, who had an interest in bringing the question to a speedy hearing, as during the pendency he had to pay his wife's costs and alimony, is the person who in every stage has opposed the most vexatious delays. The case came up here by appeal on an interlocutory matter; (a) there was also an appeal to the Delegates on an alleged grievance; and the cause being remitted, a final sentence was given here in Easter term 1825; (b) from this judgment the husband again appealed, but took no steps in the Delegates—did not even print the process: the cause was accordingly, a second time, remitted to this Court in December 1827; and the present application has not been sooner made, because the husband has been resident abroad.

It is impossible to conceive a case in which a husband could have treated a wife more injuriously, or have conducted the suit more vexatiously: he has thrown every possible impediment in the way of her obtaining justice—he has evaded every attempt to bring the question of alimony before the Court. The only way has been to allot certain sums by way of alimony—the whole taken together has not exceeded 140*l.* a year—which, and 120*l.* a year of her own, make the total amount of the income she has been receiving 260*l.*; but this is now brought still lower by the reduction of the five per cents. in which stock her small property was invested.

Out of this pittance she has been obliged to incur very considerable expences: being in very delicate health she has been compelled to resort to the sea and to have the benefit of medical attendance—and in addition to this, she will have to defray some extra costs in this protracted litigation.

The husband, it appears, is a gentleman of considerable fortune and consequence, at Tong Castle in Shropshire, where he possesses the manor and estate, and might move in the most respectable society. Though his wife has borne him fourteen children—twelve of whom are now living—yet he has been guilty of the lowest and most profligate adultery. Notwithstanding these circumstances the Court must not allow any indignant or vindictive feelings to operate in allotting to this lady her permanent alimony. It must take all the circumstances coolly and impartially into consideration.

An allegation of faculties having been given in, the husband's answers were taken; but, as they were not satisfactory, witnesses were produced to prove the annual value of the estates. Many of the tenants and occupiers of particular farms were examined, but the principal witness was Bishton—a surveyor, well acquainted with the property: it is not, however, necessary to ascertain very precisely the exact amount—a general rough guess coupled with other considerations will be sufficient. The

(a) See 1 Add. 114.

(b) A report of this Judgment will be printed in a Supplement.

annual value, according to the survey by Bishton, (exclusive of timber amounting to 36,000*l.*) is 6,380*l.*;—according to the husband's answers 4,400*l.*: and the particular witnesses make it more than the husband but not quite so much as the surveyor. If, deducting outgoings (but not the ordinary repairs nor improvements (*a*) as I suppose the Surveyor in estimating the estate would consider these)—mortgages—interest on debts—and his mother's annuity—I take the net income from the estates at 4,000*l.*; it is the utmost that the husband can be supposed to possess. Here are twelve children—sons and daughters—some growing up—whom it is necessary to maintain, educate, and advance in life: a part of the income must necessarily be expended in meeting these demands. Possibly if the wife has a liberal allowance she would gladly take some of the children, particularly the daughters, and the Court would gladly remove them from the contagion of the father's example; but it can neither direct nor calculate upon that. The wife, however, is entitled to be subsisted in a state of comfort and respectability consistent with her station in society. The misconduct of her husband is not to deprive her of that to which she would be entitled as his widow (for she is to be looked upon as a widowed wife) and as the mother of this large family. It does not however appear, if any nor what settlement was made for her in case of her widowhood: but it is stated that an annuity of 400*l.* is paid by Mr. Durant to his mother—Mrs. Chapman. She has, I presume, re-married, and may therefore have lost part of the provision she would have enjoyed had she continued unmarried—in her widowed state. Mrs. Durant too appears in very delicate health: but, considering the largeness of the family Mr. Durant has to provide for, if, in addition to her own 120*l.*, I decree 600*l.* a year to be paid by the husband, as permanent alimony, payable quarterly and from the date of the sentence in this Court, it seems to me that I arrive at the fair justice of the case between the parties: I am the more cautious not to go too far, as Mr. Durant does not appear by counsel. The arrears are justly due, and, if she can recover them, will assist in discharging any debts she may have contracted, and will enable her to live in comfortable retirement adapted to the enfeebled state of her health.

(*a*) In his answers Durant estimated "Annual repairs and improvements"—500*l.*; and "abatement of rent *per annum* for lime and underdraining"—400*l.*

### KEMPE v. KEMPE.—p. 532.

Permanent alimony is always larger than alimony *pendente lite*: out of an income of 750*l.* the husband having no state nor family to maintain, 250*l.* allotted to the wife, she taking charge of their only child.

THIS was a suit of divorce, a separation *à mensâ et thoro*, brought by Letters of Request from the Court of the Archdeacon of Cornwall, and instituted by Elizabeth Kempe, against John Arthur Kempe, her husband, by reason of his adultery. The marriage took place on the 3d of October 1826; and the cohabitation ceased in April 1827.

*Phillimore* and *Lushington* for the wife.

The *King's Advocate* and *Addams*, contra, submitted—in respect to

an allotment of permanent alimony—that the property wholly came from the husband.

JUDGMENT.

SIR JOHN NICHOLL.

It being admitted in this case that the guilt of the husband has been fully established, it is my duty to pronounce the sentence prayed by the wife—viz. a separation from bed and board on account of her husband's adultery. I proceed then to the consideration of the question of permanent alimony.

Undoubtedly the wife is entitled to a comfortable subsistence in proportion to her husband's income, and the allotment is always more liberal when the husband's delinquency stands proved, than pending suit. In this case there is no reason why the allowance should be less than usual: the husband has neither state nor family to support—he is living in retirement on his half-pay and private fortune.—His income is £729—besides personal property worth about £700, making altogether an income of rather more than £750 per annum. Alimony at the rate of £250 per annum will not be too much, as Mrs. Kempe is, I apprehend, willing to take the child. If she declines to take it, the Court may be induced somewhat to lessen this sum, but if the refusal proceeds from the husband; if he will not allow his wife the comfort of retaining her infant; the Court, though it cannot control a father's rights, would not be disposed to hold such refusal as a ground for reducing the allowance. His conduct has been highly reprehensible—he is not a very fit person to bring up the child under the tuition of the partner in his guilt—a girl too of low condition—his servant before marriage; and it is due to the morals of society that a dissolute husband, who so offends, should contribute liberally to the support of an injured wife: and should also, at least, have no inducement to exercise his power as a father, by withdrawing the child from the care of the mother, and to bring it up in the scene of his own domestic profligacy. The child is under a year old, and as Mrs. Kempe has acted with great forbearance and very much with the feelings of a wife and of a mother on the occasion, the welfare of the child would probably best be secured under her maternal care.

I allot 250*l.* per annum, as permanent alimony, to commence from the date of the sentence: for though no alimony *pendente lite* was granted (because none was asked,) the suit has not been long pending, and the present allotment is liberal. Besides, the question now solely regards permanent alimony, and I should interfere with the usual course of practice if I decreed its commencement to date from an earlier period.

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GRIGNION v. GRIGNION.—p. 535.

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*On Petition.*

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A sum of money being left to the executors, in trust to invest and pay the interest to A. for life, and after A.'s death to divide the principal among his issue on their respectively attaining the age of twenty-one, with benefit of survivorship till that age—A. being dead, his only three children majors, and the shares of two of them paid over, the Court will proceed, in a suit of Subtraction of Legacy against the executor, to enforce payment of the third's share, holding that the character of trustee is at an end, and that of executor alone subsisting.

## JUDGMENT.

SIR JOHN NICHOLL.

The facts and proceedings in this case were stated when the protest was argued, (a) but it may be convenient briefly to repeat them.

It is a suit for Subtraction of Legacy brought by Andrew Biggs Grignion, one of the substituted residuary legatees in the will of Reynolds Grignion against Claudius Grignion the surviving executor. The citation was personally served on the 7th of February 1828: an appearance was given, but under protest, alleging;—"that Reynolds Grignion the testator died in 1787—leaving a will dated in 1785, of which Isaac Webb and Claudius Grignion were executors—and that he thereby bequeathed to his executors 120*l.* and one fourth of the residue *in trust*; that the executors had proved the will in the Prerogative Court and invested the 120*l.* and the fourth part of the residue in their own names as *trustees*;—and therefore that the matter is not within the jurisdiction of this Court."

It was replied, "that after payment of the debts and other legacies, one fourth of the residue and 120*l.* were directed to be placed in government securities in the names of the executors, the interest thereof to be paid to the testator's son Israel for life, and on his death the principal to be divided among his children on attaining the age of twenty-one—that Israel died in 1813—leaving three children; Jane, James, and Andrew—the party in this cause; that the executors paid Jane and James, each one third, on attaining their respective majorities—that Andrew Biggs Grignion attained the age of twenty-one on the twenty-first of June 1827—but that the executor refuses to pay his proportion—that he therefore submits that the question is subject to the jurisdiction of this Court."

The question then is, whether this Court has any jurisdiction to entertain this suit: if it clearly has no jurisdiction, the Court would not suffer the parties to proceed and to incur unnecessary expence—it would stop without waiting for an injunction; but, if the point be at all doubtful, the Court would be bound to proceed; for to refuse the exercise of a jurisdiction, which is competent to entertain the suit, and to which a party applies, is a "sort of denial of justice."

Is there then any sound principle or authority clearly showing that this Court cannot and ought not to entertain the case? Causes of Subtraction of Legacy are undoubtedly of the cognizance of this Court: the executor receives his authority from the Ecclesiastical Jurisdiction—a part of his functions (which he is expressly sworn to perform) is to pay the legacies—if he omits to discharge this duty, the jurisdiction from which his authority emanates, is naturally resorted to, in order to compel him to proceed. This Court then enforces payment where the legacy is subtracted. It is true that Courts of Equity exercise a concurrent jurisdiction; the principle, upon which that concurrency has been assumed, is that all executors are in the nature of trustees—the legal property of the effects is in the executor and must be collected by him, though he holds these effects in trust for the legatees. Speaking with all possible respect of past times, there does seem a little of refinement and fiction even in the foundation of this concurrency of jurisdiction; but that is now a point perfectly settled. It is equally settled that if

(a) *Lushington* in support of the protest; *Addams* contra.

there is an unfinished trust, or if the interests of third parties are to be protected—Courts of Equity have not merely a concurrent but an exclusive jurisdiction. On that ground, if in this case any proceedings had been attempted during the life-time of Israel Grignion the legatee for life, or during the minority of his children, this Court would have refused to entertain the suit; there being ulterior interests to protect, to which a Court of Equity, being the guardian of all trusts, could alone be competent. On the same principle if a legacy is given to a married woman, this Court is incompetent, because it cannot compel the husband to make a settlement; it can merely enforce payment: so also at one time Courts of Equity required legatees to give security to refund, and on that ground they granted injunctions, though that ground would go nearly to annihilate this jurisdiction altogether, and to assume an exclusive jurisdiction: but now Courts of Equity have themselves abandoned that rule of requiring legatees to give security to refund; and therefore allow these Courts to compel payment.

Now, what is the case in the present instance? The legacy is given to the executors in trust for Israel for life; then to his issue with benefit of survivorship till they attain the age of twenty-one, but, having attained that age, to each of them absolutely share and share alike. It is hardly necessary to read the will itself, but I will advert, for greater certainty, to the part which applies to the present question:—

“And as and concerning the 120*l*. and the remaining fourth part of the residue of my personal estate given to Isaac Webb and my son Claudius in trust—I do hereby declare that the same are and is so given to them upon trust that they shall and do place, lay out invest and continue the same at interest in or upon some or one of the public funds or government security, and also shall and do from time to time for and during the term of the natural life of my son Israel Grignion pay the yearly dividends interest and proceeds thereof unto my said son Israel or authorize and suffer him to receive and take the same when and as they become due and payable to and for his own use and benefit.” [So it is given to Israel for his life.] “And as to the said sum of 120*l*. and the said last mentioned fourth part of the rest residue and remainder of my personal estate and effects and the stocks funds and securities in or upon which the same shall or may be so placed laid out or invested my will and mind is and I do hereby declare that the said Isaac Webb and my said son Claudius their executors and administrators shall and do from and immediately after the decease of my said son Israel stand be and continue possessed thereof interested therein and entitled thereto in trust for all and every the child and children of my said son Israel equally to be divided between them share and share alike to be paid and transferred to them respectively when and as they respectively shall attain the age of twenty-one years.”

These trusts are now all at an end. Israel is dead leaving three children—all have attained the age of twenty-one—each is entitled to his third—there is no resulting trust to be executed—each has a vested absolute interest in his legacy—to receive it and do what he pleases with it.—Nothing remains to be done but to enforce payment. The executor—though not expressly called a trustee in the will, (a fact that makes no real distinction)—has had both characters—his function as trustee has been finished—his duty as executor remains—namely, to pay the

legatees. This seems to be the substantial good sense and plain reason of the matter, stripped of refinement, and fiction, and technicality. As executor he is sworn to pay the legacies: this is a legacy now become absolute and due—simply to be paid—the executor subtracts it—he refuses payment: has this Court then the jurisdiction to enforce the duty which, when the office was committed to him he swore to this Court to discharge? or is it clear that a Court of Equity would grant an injunction to restrain this Court from proceeding?

The authorities quoted do not satisfy me that an injunction would be granted—the trusts under this will have never been subjected to the enforcement of any Court of Equity—there have been no proceedings had so as to put any other Court in possession of the case supposing it a question of concurrent jurisdiction—the two elder children have been paid each one-third—so that there is not any question of construction: none is alleged. It was thrown out in argument—but it is not alleged in the protest, and perhaps need not be noticed—that there may be behind a question of the legitimacy of this younger child: but surely a question of legitimacy, of all others, is not one which the Court Christian is not competent to entertain—the point, however, is not raised for my consideration: but do the authorities show that a Court of Equity would enjoin under the circumstances of this case? if they do, and clearly, this Court would not proceed.

The general proposition is, that Courts of Equity have the exclusive jurisdiction of all trusts: the answer is, here is no trust remaining—here only remains the duty of an executor—the payment of a legacy absolutely vested in the legatee. Mr. Toller's book, p. 490, is only of authority so far as it is supported by the cases to which it refers. In the case quoted from 1 Barnewall and Cresswell, *Ex parte Jenkins*, 1 B. & C. 655, it appeared upon the face of the writ *de contumace capiendo* that the suit had been brought against the party in the character of trustee: therefore the Ecclesiastical Court had no right to proceed; and he was discharged out of custody. Here the suit is brought against Claudius Grignion in his character of executor.

The next case is *Stonehouse v. Stonehouse*, 1 Dick. 98. The whole of that report are the following words—"Injunction granted to stay proceeding in the Spiritual Court for payment of a legacy until the hearing, and plaintiff to speed the cause." This is the whole—there was a suit depending, because the order was to stay proceedings till the hearing: such an order would be a matter of course. There might be existing trusts to execute, respecting which the suit in equity was depending—it might be a question of assets and of account—it might be a legacy to a minor or to a married woman:—the case is much too blind, and not at all sufficient to influence me. On the present occasion it is not alleged that there is any suit in any other Court.

*Smith v. Kempson*, 2 Dick. 769, is of the same sort. It is an injunction to stay suit for a legacy till the hearing, while there was a proceeding in Chancery between the executors for an account to ascertain assets. The same observations apply to this case as to the last—it was a very good reason to stay proceedings that a suit was depending in another Court, where a question of accounts was under investigation. The decision in that case does not lead me to apprehend that this Court would in the present instance be prohibited, for it does not determine that the Ecclesiastical Court had no jurisdiction—only that the suit must be stay-

ed there while the Court of Equity is proceeding in it for another purpose.

There are two cases in Price's reports—The Attorney General v. Lady Louisa Manners, 1 Price, 411; and Hill v. Atkinson, 3 Price, 399. The question in both was, whether money paid into the Bank in trust for legatees was liable to the legacy duty and to what duty. There was no question of jurisdiction or injunction; they bear very remotely if at all on the present question: if at all, they bear adversely on this protest; for it was not held that the money was appropriated. The latter case is also reported in Merivale, Hill v. Atkinson, 2 Meriv. 54, and upon dismissing the petition (which was merely as to the payment of the legacy duty) the Lord Chancellor observed: "In the case of the Attorney General v. Lady Louisa Manners, it was the opinion of the Barons, that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy." So that merely investing in the funds, according to the opinion of the Barons of the Exchequer, does not alter the character; but if paid into Court under a decree, and the trusts declared, (this is the distinction) it would be an appropriation. That case goes thus far; that where there is a double character of executor and trustee, an investment under an interference of the Court is an appropriation: but in neither, as I have said, was there any question discussed as to the ecclesiastical jurisdiction.

The more direct and most important case is an anonymous case—before Lord Hardwicke in 1738—reported in Atkyns, 1 Atk. 491. It is expressly under the head "Injunction:" in which the Counsel for the plaintiff, in showing cause why an injunction should not be dissolved, relied on the case of Knight v. Clark, cited in Noel v. Robinson, 1 Vern. 93, where the Lord Chancellor (Nottingham) said, "There was a difference between a suit for a legacy in the Spiritual Court, and in this Court; if in the Spiritual Court they would compel an executor to pay a legacy without security to refund, there shall go a prohibition." The ground there is, then, that the Spiritual Court would not require any security for refunding, which in those days the Courts of Equity did. "Lord Hardwicke continued the injunction till the hearing, because the plaintiff is an executor in trust only, for where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction, trusts being only proper for the cognizance of this Court." Now if this meant that an injunction would be granted wherever the executor, though not expressly appointed a trustee, yet in effect was acting in trust for the legatees; this would tend to destroy the jurisdiction of this Court in all questions of legacy. But the Lord Chancellor proceeds: "Since the case in Vernon the rule is now varied, for legatees are not obliged to give security to refund upon a deficiency of assets." The rule, therefore, in a court of Equity does not vary from the rule of this court in that respect. The reporter adds—"His Lordship mentioned a case where an infant was entitled to a legacy, upon her marrying; the husband instituted a suit in the Ecclesiastical Court for it, which he might do, but upon the executors bringing a bill, and suggesting this matter to the Court, an injunction was continued to the hearing." In that case there was a ground for the injunction, because this Court could not compel the husband to make a provision suitable to the rights of

the wife, and it was therefore necessary to resort to the Court of Chancery.

This is the whole of the case, and it leads to these results: that where there is a trust, or where the Ecclesiastical Courts cannot do justice, as happened while the demand for security to refund was the practice of the Courts of Equity,—or where a married woman is to be protected— or where there are proceedings in account to ascertain assets— or where there is any thing in the nature of a trust *to be executed*; an injunction will go—but not, as I understand, where there is the bare duty of an executor to perform—to pay legacies: for that would in all cases give an exclusive and not a mere concurrent jurisdiction.

In the present case, in my view, the simple duty of executor remains—to pay the legacy: there is no longer any trust but that which belongs to all executorships. I have considerable doubts whether any Court of Equity would enjoin, and perhaps, have reason to think that they would not. Times are changed—a more liberal and enlightened view of questions of jurisdiction is taken: on the one hand, these Courts have no disposition to encroach—*ampliare jurisdictionem*—on the other hand, Temporal Courts have no jealousy—no wish to resort to fictions and to technicalities: they look (where not bound by former decisions directly in point) to the real substance and sound sense of the question—to that which is really most beneficial to the suitors—the public—and subjects of the country. There is quite as much business in all Courts as, under the increase of wealth and population, the institutions are able to discharge. The original jurisdiction in cases of legacy, to enforce payment and to compel executors to perform their duty, was in these Courts: Temporal Courts, however, interposed by injunction or prohibition when those Courts were already in possession of the cause, or when the powers of the Ecclesiastical Judge were defective or insufficient—but I find no case in which Temporal Courts have stopped these Courts, where no trust was existing (beyond the mere technical trust of executorship) which remained to be executed—where no legatee was to be protected by any special power—where a Court of Equity had not already been resorted to and was not in possession of the case.

The present case, as far as appears and is stated in the protest, is a mere subtraction of legacy—is a suit simply to enforce payment. The party who applies may have reasons for resorting to this jurisdiction—by the very fact of his suing here it must be presumed that he conceives it would be a more convenient and beneficial jurisdiction for him:—whether he judges rightly it is not for this Court to decide; nor, unless it clearly appeared that the Court had no jurisdiction, has it any right to refuse to entertain the suit—it would be a denial of justice.

Thinking then, that at least it is a matter of doubt, whether Temporal Courts would stop this suit by injunction, I hold it proper to overrule the protest. At the same time I should much regret misleading the parties and involving them in unnecessary expense, by taking an erroneous view of the subject through an insufficient acquaintance with the rules of a Court of Equity. I should therefore strongly recommend to the party, who institutes the present proceeding, (being now possessed of the view taken by this Court) to resort to the best advice he can respecting the rules of Courts of Equity. If under that advice he should be satisfied that an injunction would be granted, he may immediately declare, that he proceeds no further in this Court.

In respect to costs, it seems proper to reserve that consideration till the cause is fully disposed of.

Protest over-ruled.

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## PREROGATIVE COURT OF CANTERBURY.

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In the Goods of WILLIAM CRINGAN.—p. 548.

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### *On Motion.*

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A person dying in Scotland having by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate granted to the nominees as executors.

THE deceased—late a Surgeon of H. M. twenty-fifth regiment—died in Scotland in January 1828. By his will—dated “Antwerp 1st June, 1815”—he bequeathed to his mother the interest of all his money for life; and at her death he gave to each of his brothers 100*l.*, and, to each of his sisters 200*l.*: the remainder of his property he directed to be equally divided among his brothers and sisters and their lawful heirs. The deceased appointed no executor, nor residuary legatee; but the last direction of the will was in these terms:—

“It is left to the Legatees mutually to appoint two intelligent and trust worthy persons to execute this deed, and I would earnestly recommend the money to be either placed in the English stocks or lent on good landed security with a guarantee for the regular payment of the interest.”

The deceased left a mother, three brothers and three sisters; all of whom (with the exception of two of the brothers in Canada) had by their proxy appointed “Thomas Hutchinson of Terswaldsmains, near Dumfries, and John Halliday of Sanquhar, merchant, to act as executors under the will of William Cringan, and to take probate thereof.” The substitution of these persons, it appeared, had been admitted by the Court at Dumfries upon the appointment, solely, of the brothers and sisters in Scotland.

The property in this country was a sum under 200*l.* due to the deceased for pay.

*Addams* moved for probate to the executors substituted by the majority of legatees.

### *Per Curiam.*

The provision in this will, as to the appointment of executors, I am informed, is not very unusual in Scotland; and had the Commissary Court at Dumfries, which has allowed the substitution, decreed probate, I should have had nothing to do but to follow the grant on the production of an exemplified copy. However, understanding from the Deputy-Registrar that instances have frequently occurred of granting probate to persons nominated by those authorized by the testator so to nominate, I shall allow this decree to pass as prayed.

Motion granted.

In the Goods of WILLIAM HOLDER JERRAM.—p. 550.

(*On Motion.*)

Probate, in common form, of a paper with an attestation clause and no witness, decreed to the only person entitled under an intestacy, on affidavit of recognition of it, as his will, by the deceased.

THE deceased died on the 27th of March, 1828, a bachelor. His will—written very fairly with his own hand—was dated on the 20th of January, 1825, and signed; but below the signature was the word “witness.”

From a joint affidavit made by a brother and sister of the deceased, it appeared that in January, 1827, the deceased informed his brother that his will was in a secret drawer of his writing desk, which he then showed him how to open, in case of his death; and having produced his will, he replaced it. It further appeared that about a fortnight prior to his death, the deceased told his sister “he had made his will;” and that on the day after his death, it was found by her in the secret drawer of his writing-desk. The deceased’s father, who was also an executor, had been *sworn* to administer the effects under this will; and *Dodson* now moved that probate might pass in common form.

*Per Curiam.*

The circumstances, in this case, fully rebut the presumption of law; and the father—the only person entitled under an intestacy—has been sworn as executor of the will.

Motion granted.

In the Goods of ELIZABETH WENLOCK.—p. 551.

*On Motion.*

A paper manifestly unfinished and imperfect cannot be proved on mere affidavits of finding, hand-writing, and the non-existence of any other testamentary paper.

ELIZABETH WENLOCK, late of Brightlingsea, near Colchester, died on the 27th of March, 1828, a widow, leaving three nieces and two nephews, her next of kin, and the persons entitled to her personal estate in case she should be pronounced to have died intestate. These parties (if alive) were stated to be in obscure stations, and the whole of the deceased’s property was of the value of 120*l*.

At her death was found a paper, beginning thus—“This is the last will and testament of me Elizabeth Wenlock;” it concluded with appointing her cousin, Mrs. Hodder, of London, and Mr. Root, Schoolmaster of Brightlingsea, “to be my whole executrix and executor of this my last will and testament, in consideration of which I beg his acceptance of five pounds.” This paper was in the deceased’s hand-writing, but it was not signed, nor dated; and there was no residuary clause; it was, however, stated to contain an entire disposition of her property. Mrs. Hodder was duly sworn as executrix: and probate was applied for in

the Prerogative Office, on an affidavit that the paper was in the handwriting of the deceased. When the probate was presented for the signature of the Deputy-Registrar, he directed an affidavit to the effect that no other paper of the deceased's of a testamentary import had been found.

William Root of Brightlingsea, schoolmaster, and Mrs. Hodder, the executors under the paper in question, accordingly made an affidavit, from which it appeared that, on the 21st of December, 1827, the deceased left with Root the said paper, and requested him to prepare from it a more formal will, which he did; that on the 13th of March, 1828, the deceased told Root that "as her Father had recently died, she could not execute the will in the form it then stood; nor until she had ascertained what property she really had to dispose of; that upon this occasion Root gave the will, he had prepared, to the deceased; after which he never saw, nor heard from, her; that upon her death, this instrument prepared as a will, was found among the deceased's papers, but probate of it had not been asked, "because they believed that the deceased intended the paper which she delivered to Root should operate and take effect as her last will and testament in case of her death without executing one of a more formal nature."

*Dodson* now moved for probate of the paper in the handwriting of the deceased.

*Per Curiam.*

This motion certainly affects me with some degree of surprise and alarm on account of the irregularity of the proceedings. The deceased died on the 27th of March, 1828. A paper is brought to be proved, which, on the face of it, is unfinished and more like a draft than a will. It has no concluding words, no date, no signature; and yet that paper is carried to the Prerogative office for the purpose of probate in common form. This must have been done by a mere clerk—it could not have been by the Proctor himself—an experienced practitioner.<sup>(a)</sup> But the Court is sorry to find that even a clerk should be so ignorant as not to know such a paper could not pass in common form, on a mere affidavit of handwriting. What appears more extraordinary, is, that the clerk of the seat considered the probate of this instrument as a regular grant. I should wish to be informed who was the clerk of that seat—he ought to have known better; or if he was not better instructed, he should have carried the paper to the acting Deputy-Registrar, and requested his instructions thereon—but no such thing—it is laid before the Deputy-Registrar for his signature as a perfectly regular document. Fortunately when papers are carried to the Deputy-Registrars for their signatures, they are very exact in looking to the nature of the grant, and on the present occasion the imperfect state of the paper was discovered.

It is, however, a serious hardship that all responsibility should rest on them, for in a great press of business, it is possible that an irregular probate might inadvertently pass them unnoticed; but it is hardly possible such a thing should occur if the public had, as they are entitled to

(a) The Proctor stated that he was, at the time, absent from town: and in an answer to a remark of the Court as to the motion being still persisted in, replied, that it was done partly to satisfy his client, who, as executrix, had been at expense respecting the funeral; and partly to afford himself an opportunity of explaining the matter to the Court: but that he had no hope that the Court would grant the motion.

have, a guarantee for the regularity of the grant, in the careful examination of the Proctor in the first instance; of the clerk of the seat in the second; and, ultimately, of the Deputy-Registrar.

It is stated that the Deputy-Registrar merely directed an affidavit as to the finding of the paper; this must, I think, have been a misapprehension, even from the face of the instrument itself—which is unsigned, undated, unconcluded, and appoints no residuary legatee. What now turns out to be the case upon affidavit?—that it was only a draft which was carried to Mr. Root to enable him to prepare a regular will. He, at the time, suggests an alteration which is acceded to by the deceased; and Root prepares the will for execution. The matter, however, does not rest here: the deceased comes again—says, “no,—I cannot execute this will in its present form—my father is lately dead—I must sell out some stock to pay his funeral expenses, and some debts—I don’t know what property may remain:”—she then takes the will away with her, and leaves the draft; so that it appears probate of this paper, abandoned by the deceased, was on the point of passing in an ordinary way. This, of itself, is sufficient to excite considerable alarm; and still more so, when I look to the statement—that there are several next of kin—persons in very low and obscure stations in life—who, though they are the parties legally entitled to take the property, yet have not been informed of these applications for probate. Every practitioner here must be aware that an unfinished paper cannot take effect on a mere affidavit as to finding and handwriting. If no other paper exist, that fact alone will not render such an instrument as this valid without some circumstances accounting for its imperfection, and without first citing the next of kin. It is then quite impossible that this motion can be granted; and I direct that inquiry may be made, who was the clerk of the seat that would have allowed the probate to pass; and that he may be desired to act with greater caution for the future.

Motion refused.

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YOUNG, otherwise MEARING, v. BROWN.—p. 556.

A testator, while at variance with his relations, having made a will in favour of a stranger in blood, being afterwards reconciled to his family and his full capacity down to his death being admitted; a subsequent will—in favour of his family, (produced shortly after his death from the custody of the drawer, who took nothing under it, nor was acquainted with those benefitted by it; the *factum* whereof—though occurring in secret and in a strange manner—was proved by the drawer and two unimpeached witnesses)—pronounced for; and the executor of the former will condemned in 20*l. nomine expensarum*, he having directly alleged the second will to be a forgery; but succeeded in showing the drawer to be of doubtful character.

Dissimilitude of hand-writing is very weak and deceptive evidence, and of slight weight only against evidence of similitude; but, against positive evidence of witnesses attesting and deposing to a signature, as actually made in their presence, it can scarcely have any effect.

The executor of a former will deriving all his interest from—and if deprived of such interest being deprived by, the act of the deceased, is not entitled, in opposing a later will, to the same indulgence as a next of kin, who has by law a right to the succession unless ousted by the express direction of the deceased,

THIS case was argued by *Phillimore* and *Addams* for Mr. Young, and by *Lushington* and *Dodson*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The evidence in this suit is sufficient to satisfy my mind. It is not a case involving a variety of circumstances inferring doubtful capacity, nor circumstances from which mere fraudulent circumvention is to be presumed; but it turns on a plain broad fact whether the instrument was executed by the deceased, or is an absolute fabrication and forgery. The case assumed that shape from its very commencement; for when the instrument was propounded in the *condidit*, the first article of the allegation opposing it contained a direct averment that the paper was not signed by the deceased, nor was his act, though it was admitted that at the time of the date he was of perfect capacity.

The history of the party and of the transaction may bear materially on the probability whether it was or was not his own act.

The deceased's name was James Brown Unwin, and he died suddenly of apoplexy on the 20th of July 1827, though seized two days before with cholera morbus; he was the only child of Walfred and Elizabeth Unwin, and having been born in 1787 or 1788, was about 40 years of age: his mother's sister married one Kings, a coachmaker, and the two sisters afterwards lived together with their husbands in Duke Street, Bishopsgate—but Kings, for the last five years, resided in Southampton Street, Pentonville. About 1796 Richard Salter Young, then an infant of eighteen months (whose child he was does not appear) was placed at nurse with Mrs. Unwin—he was seven or eight years younger than the deceased—was brought up as one of the family—called Mr. and Mrs. Unwin father and mother—Mr. and Mrs. Kings, uncle and aunt—he and the deceased called each other brother, and they went to the same school. The deceased was afterwards apprenticed to Messrs. Savage and Taylor, Apothecaries in Bishopsgate Street, and when he was out of his time was principally by the assistance of Mrs. Kings, set up in business first in Widegate Street, Bishopsgate, from whence he removed to Bethnal Green Road: he took this brother, if so I may call him, to assist in his shop—not as an errand boy, as Brown pleads—(though when the errand boy was absent he did occasionally carry home medicines) but in compounding drugs and in the ordinary business of an Apothecary's shop. The deceased married a wife rather of an unfortunate temper—she brought about a quarrel between the deceased and all his family, and having also taken a dislike to this lad he and the deceased were at length forced to part; the immediate complaint of the wife seems to have been, that in weighing out three penny-worth of senna he had given too much weight: but it clearly results from the evidence, that the separation took place not on account of the misconduct of Young—not from an alienation of the deceased's regard—but owing to the influence of the wife.—In consequence, about 1811, Young took to a seafaring life,—went first as a surgeon—then engaged in the Mediterranean trade, and is now master of a vessel. The deceased continued on ill terms with his own family, and on that account Young's only communication, when in England, was with the father and mother and the Kings, and for fourteen or fifteen years or longer he had no intercourse with the deceased.

While matters were in this state, the deceased—alienated from his own family through the wife—made two wills. The first dated on the

28th of September, 1814, is all in his own handwriting and attested by three witnesses: it gives nothing to any part of his own family, but leaves every thing to his wife and appoints her the sole executrix. The second, dated on the 10th of February 1819, gives to his wife, the furniture, &c. absolutely, and every thing else for life, with the remainder to John Brown, son of the Rev. William Brown: and appoints his wife and William Brown executors. Thus his wife and his friend Brown's family are alone benefitted by the will of 1819; his own family and all his other friends are excluded, and that will was deposited with Brown. As executor of this will of 1819, under which his son is solely benefitted, (for the wife is dead,) Brown now opposes a later will—the will in question in this cause.

Subsequent to the will of 1819, a material change of circumstances took place. The deceased's wife died about three years before him—and his mother appears to have died still earlier: his father, Walford Unwin—an old man of 74, who had lived with the Kings and was entirely supported by them till the death of the deceased's wife—was, on that event, very naturally and very properly taken to reside with the deceased: the latter had quitted business, had agreed for the purchase of a cottage at Warminster, and was preparing to go and reside there.

That he should therefore continue to adhere to this will of 1819, giving every thing to John Brown, and leaving his own father wholly unprovided for, now that his wife was dead and his father had been taken to reside with him and was wholly dependent upon him, was not only extremely unnatural and improper, but highly improbable. In addition, he had taken offence at William Brown—he mentioned to some of his friends, that Brown had insinuated that an improper intimacy existed between him and his housekeeper; he was much hurt—he felt it as an insult: and though this breach appeared in a short time to be made up, and though they were again outwardly friends, yet he said “he should not forget it”—it rankled in his bosom: the way in which he mentioned it to Pocock, who was a gardener and saw him frequently, is this:—

On the sixth article, “the deponent says, that the deceased and the articulate William Brown used to be very intimate; they were of the same party in parish disputes; but about four months or so before the deceased died there was a question in the parish about the appointment of a mistress to the workhouse, on which they took opposite sides, and a quarrel followed. Deceased told deponent that Brown in the course of the dispute had insinuated something improper about him and his housekeeper which he could not stomach, and that he never would forgive him so long as he lived; that he ought not to have used him so; he had been such a friend to him. Deponent told deceased, they should forget their disputes as soon as they left the vestry; but deceased said, ‘it was quite impossible; Brown had hurt him here, pointing to his breast, and he never could forgive him.’ Before this deceased used to talk with deponent about William Brown as one of his friends.”

Now though the deceased does here express himself so strongly, yet their differences were partly reconciled—still however he thus mentions the subject to Bigg:—

“The deceased was giving deponent an account of what had passed at the vestry, and the deceased said, ‘Bigg, Brown has injured me, and I won't forgive him; he has insinuated that I and my servant maid are thick together.’ The deceased was very much excited at the time, and in a

great passion: but deponent knows that deceased and Brown were reconciled after this; and very shortly too, for a few days afterwards deceased dined at Brown's house—at least he told deponent so; and deponent joked him about his having said he never would forgive Brown, and about his having made up his quarrel so soon, and the deceased said between joke and earnest—‘Ah, but I shan't forget it.’”

The plain fact is that it was a quarrel which very much hurt the deceased, who at the time was highly indignant, but as he had always acted with Brown in parish matters, he did not entirely break off nor discontinue his intercourse with him: but this quarrel had its effect. Besides this, it is in evidence, that though he was anxious that young Brown should succeed well in business as an apothecary, yet he made some little complaint of his want of attention to him. Hardingham says;—“the deceased used to complain that John Brown did not call upon him and had forgotten him.” So there are some symptoms of dissatisfaction with the principal legatee.

In this situation of circumstances his old friend—his *quasi* brother—Richard Young—who had been excluded from his society during the lifetime of his wife,—was in London, and an accidental meeting took place between them in May. All their former feelings and affections seem to have revived at this meeting; they spent a long evening together, smoked their pipes, took their wine freely, talked over former days, and, as is not very extraordinary, their meeting ended in intoxication. Hardingham found them smoking together in the deceased's garden,—perceived they were on interesting topics and soon retired:—“The impression on the deponent's mind was that they were on the most cordial terms, and there appeared to have been an old and strong friendship between them.” In continuation of this history, Pocock—who was very intimate with the deceased, had a garden ground adjoining his premises, and had allowed the deceased to open a door of communication into it for his own convenience, for he was something of a Tulip fancier—states:—“He remembers very well that about the latter end of May, before the deceased died, he came through deponent's garden; sat down at the door of the house, and complained of a head-ache, and said, ‘he had had too much the night before, that a friend had come to see him, whom he had not seen for sixteen years, that that friend (whom he called ‘Dick’) had lived with him when he was in business; but that they had separated through the interference of his the deceased's wife.” The deceased then gives him an account of the quarrel about the senna, which the witness details.

Here then is not a mere accidental meeting, but a complete renewal of their boyish attachment, though it was the only interview. The deceased and the Kings, from some difference about a money transaction, were not upon very cordial terms and did not see much of each other; but there had been no absolute quarrel. Mrs. Kings also, from knowing the deceased had some propensity to drinking, on hearing of this interview, and of the intoxication that ensued, advised Young not to go again, though several messages were sent to him from the deceased by his father. Now this renewal of the early affection, in addition to the circumstances respecting his father and the Browns, renders it not improbable, that the deceased should make a new disposition, such as that contained in the will propounded.

This will is dated on the 18th of June 1827, and bequeaths all his property to Richard Salter Young in trust to pay to his father, Walford Unwin, an annuity of 100*l.*,—to his housekeeper Hannah Turner an annuity of 10*l.*, to whom is also left the cottage of Warminster—(describing it as in Devon instead of in Wiltshire—an error to which I shall presently refer—in this cottage it appears Hannah Turner had some interest—I remark this because it shows the accuracy of information respecting the deceased's affairs);—to William Gale, weaver, 50*l.*,—to Charlotte Gale his daughter 200*l.*,—the residue it gives to Young and appoints him executor—it is signed, sealed, and attested by three witnesses.

This is the will and such is the disposition it contains. Connected with the circumstances, it carries with it every presumption in its favour, and except that the mode of preparing it is rather singular, and that the person employed to prepare it is, to no inconsiderable extent, attacked in credit, there would be nothing extraordinary in the case; for the time and manner of its appearance is the natural sequel of the mode of execution: but, on the other hand, the difficulty of supposing this a fabrication and forgery appears to be much greater than those objected in opposition to the will.

Plaisted, the drawer, is an old attorney, in embarrassed circumstances, and not in the most respectable practice. Witnesses have been produced against his character: five would not believe him on his oath—one of these only knew him in his youth—a second forms his opinion only on what he has heard; and some by their own showing do not stand much higher in credit than Plaisted himself would, if their depositions were believed. On the other side, there are witnesses who entertain a favourable opinion of him—particularly Mr. Bates a silk-weaver, who appears respectable and a man of property, and who has had some considerable experience of Plaisted's integrity. However Plaisted is not *omni exceptione major*, and the Court would hear him with caution; particularly if speaking to that which was matter of opinion or which might be easily misrepresented—such as capacity, volition, or affection,—but here the sole inquiry is a broad simple fact, whether the will was or was not executed at the asserted time: he says “he had a speaking acquaintance with the deceased for twenty years,” and that accounts for the deceased employing him; though it has been observed that this was very singular; and it has been asked, why he should not employ the Vestry Clerk Brutton. If it were necessary to explain this, there are some manifest reasons—Brutton was in the constant habit of seeing Brown—it was not singular that the deceased should be unwilling to employ any person through whom it was possible that Brown might be made acquainted with the change in his testamentary intentions: but he certainly was unfortunate in his selection of an attorney, for the individual was not the most respectable.

“He had been acquainted with the deceased for about twenty years; and in the habit of conversing together. About the middle of June, 1827, he met the deceased in or near to Gracechurch Street, who after talking on some common topics, spoke to him about his will: deponent recommended him to make it immediately, on account of the bad results he had seen from delay:”—There was another reason perhaps:—however he thinks it a good opportunity, and he takes the deceased with him to the Temple, where he knew Mrs. Cobbett, who had the care of some chambers, and she lends him a room. Plaisted states that, as they pro-

ceeded to the Temple in a hackney coach the deceased communicated to him, verbally, the disposition he wished of his property, so that he was at once able to write it out fairly, and fit for execution;" he also says, that while he was preparing it, he read over each passage; and finally the whole together, previous to the execution."

This is, in substance, Plaisted's account of the transaction: and considering that he had passed most of the last twenty years in a gaol and was in a state of great poverty, it is not extraordinary that he should be anxious that the job should not escape him, and that he should propose an immediate execution; and as he says he was going to the Temple on other business, that accounts for his carrying the deceased to this woman's chambers rather than to his own office in Millman Place. The chief objection is, the paper itself is so correctly written that it has not the appearance of being composed without a draft, but rather of being a fair copy; but I am not able to say that this experienced practitioner of 64 years of age might not have prepared it off hand; and if his skill was adequate to the task, his penury would urge him to get the business thus far advanced, as it would entitle him to his fee, though he states he was not paid at that time: but even admitting that the Court cannot with safety rely on Plaisted singly, what is there to shake the credit of the other two witnesses, Mrs. Cobbett and Mrs. Craddock, who heard the paper read and with Plaisted attested the execution? and if their statement cannot be gainsaid, Plaisted's evidence may be blotted out of the case. The story they tell is quite plain—and the account given of Plaisted's acquaintance with Mrs. Cobbett—of his taking the liberty of applying to do the business in these chambers—and of the circumstances that brought Craddock there—is perfectly probable and natural.<sup>(a)</sup> If either of these women are not what, upon interrogatories, they represent themselves, it might have been disproved after publication.

Now Craddock particularly fixes the time in confirmation of the instrument:—he says, "she called on Mrs. Cobbett when she came to London occasionally: that about a fortnight before last Fairlop fair, which is held on the first Friday in July, about twelve o'clock of the day (but of the day of the month or week she has no recollection) she called on Mrs. Cobbett at her rooms in the Temple; that after she had been there about half an hour, two persons—quite strangers to deponent—came to the door: one was a little man—the other was a remarkably tall stout man; and she thinks the smaller was called Plaisted."—She then speaks to the execution of the will.

(a) Mrs. Cobbett deposed, "that she was introduced to Plaisted about September 1826; and that she employed him to recover a small debt; that she never saw him upon any other occasion before the latter end of June last, in the forenoon of the day, when he came with a stranger to her apartments in Fig-tree Court, and asked her if she would let him come in and do a little writing, and she allowed him to do so; that the stranger and Plaisted conversed, and the latter wrote; that after they had been so engaged about an hour and a half, Plaisted asked deponent, "if there were any Clerks," and being told, "none in the chambers," he asked her and Mrs. Craddock (for they were both in the room—Mrs. Craddock had called in) to witness Mr. Unwin's will—pointing to the stranger—to which they consented—and Plaisted read the will over in an audible and distinct manner."—On the fourth interrogatory she said: "she is employed by Mr. Walker to wait upon him and take care of his chambers: that she has been acquainted with Mrs. Craddock about five years, who had formerly lodged with respondent; but had since her marriage lived at Stratford in Essex."

This witness, then, fixes the period by her reference to Fairlop fair, which will bring the time back to the 18th of June, 1827.

It is said however they do not identify the deceased—but what reason is there to suppose that this paper was fabricated on the 18th of June? The deceased was then in good health—only 40 years of age—yet the Court is to believe that some person who represents the deceased and not the deceased himself executes this will! Can any thing be more grossly improbable? but if this is a forgery, who are the parties? how was it contrived? what evidence is there to support the charge? when completed, Plaisted has no interest under the document—no inducement to fabricate it—if so inclined, no sufficient knowledge of the party and of his connexions to invent a disposition so natural and a description so exact in all its parts—for placing Warminster in Devonshire must be through Plaisted's ignorance or oversight, and the error might have easily escaped the deceased's notice on reading it over; for it is mentioned that he held his hand up to his face and appeared depressed in spirits, a feeling which the seriousness of the occasion might naturally produce, and which would not render him very accurately attentive to mere words of description. If Plaisted was the fabricator, he must have had some instructor as well as employer—Who are they? Young did not know—never saw—him. Nor is there any proof that the other parties ever knew or saw him.

But further, the two women have been separately and unexpectedly called upon by interrogatories, not put to Plaisted, to give a minute account of the person and dress of the deceased, and they quite agree in that account. The description of him is singular—in person, they state him to be remarkably large—in dress, something like a clergyman. The very object of putting these interrogatories was to contradict the witnesses, if their statement had been incorrect and false, by an exceptive allegation, and thus diversity would have been proved. None such has been offered, and I take it therefore to be a true description. I presume he was a very large man, and that he was usually dressed as these women represent; and thus the identity is established in confirmation of Plaisted. If, then, this was the deceased who executed this paper, there is an end of the question. The two women at least are not discredited—the capacity of the deceased is perfect:—here then is an execution by a capable testator—and not only that, but the instrument itself contains a disposition quite natural and probable.

These three witnesses speaking positively to the fact of execution, it is in vain for Mr. Brown to resort to that weakest and most deceptive of all evidence—dissimilitude of hand-writing. If such evidence may have some slight weight where the case for its affirmative proof depends on handwriting, still, against the positive evidence of witnesses attesting and deposing to a signature as actually made in their presence, it can scarcely have any effect. Here are a variety of exhibits produced in the deceased's handwriting, but in many of them there is manifestly a strong dissimilitude from each other—Here are several witnesses who disbelieve the genuineness of the handwriting—Here are several intimately acquainted with the deceased's character who do not hesitate to say, it is genuine. Those who disbelieve, principally rely on the signature alone, and give their reason, “because in the signature the names are at length, whereas the deceased used only to sign the initials of his Christian names.” In signing his name at public meetings, or to printed cards, or

the like, every person (and the deceased does so) signs in a hurry and in the shortest way:—a surrogate probably signs a jurat differently from what he would subscribe a bond or a deed or his own will. The deceased's papers too fell into Brown's hands and he has had an opportunity of selecting those where the initials alone occur; but witnesses prove that the deceased did sometimes sign his names at length to a lease—or the like. It does so happen that here is one document which could not be kept back—the will of 1814, and it does also happen that the signature has the Christian names written at length. Nay further—that it has rather a peculiarity—a comma or a dash between each name—exactly as the will in question—so in the second will, and in the books before me, there is the same comma between the initials. This takes away almost entirely the little weight which might belong to opinion of dissimilitude, and shows that those opinions were founded upon reasons which fail in fact—and that this species of evidence is of the most fallacious description; but to this is added, in the present case, the evidence of the two women proving that the will was signed in their presence, and by the deceased—no doubt therefore can be entertained of its genuineness.

I will, further, just observe on the manner in which the will was produced. It was left in the possession of Plaisted—he probably might have two reasons for retaining it—first, he had not been paid his fee for drawing it; and secondly, he might hope that a more formal and full will would be desired, and he might be unwilling to lose the opportunity of a second job. These would naturally operate; because I cannot lose sight of the fact that Plaisted was a needy man, and would take every care to realise whatever little profit he might have the prospect or opportunity of making. The fact that Plaisted (who had only a speaking acquaintance with the deceased and who had never seen his father, family, or Young) had the will in his possession, accounts for its non-production immediately on the death; but it was produced very shortly after, and almost as soon as the other. Plaisted, on the 7th interrogatory, has committed himself as to the time of learning the deceased's death and the delivery of the will: he says, “he heard of the death one Sunday (August the 19th) while dining at Bates’, and on the Saturday following found out Young and then saw him for the first time and delivered to him this will.” He thus fixes himself on the interrogatory—and is this true or untrue?—Bates corroborates him, though not exactly as to the day:—

“In the beginning of August last—he thinks it was the 12th, but he is sure it was on a Sunday, Plaisted was dining with deponent as he frequently did on a Sunday, but never on any other day; while talking after dinner, Plaisted asked deponent, ‘if he knew a man of the name of Unwin in his parish:’ deponent said, ‘he had known him, but that he was then dead some weeks.’ Plaisted was very much surprised; and—upon deponent's telling him that the report in the neighbourhood was that Unwin had left all his property to a Mr. Brown,—Plaisted said, that was not the case, for he had himself in his possession a will of the deceased, which gave his property in another way.”

Now this is a full, at least a sufficient confirmation of what was got out from Plaisted on interrogatories, when examined several months before. Plaisted having got the clue, finds out Young and the parties interested, and the will is delivered up in a manner quite natural and probable; and on this point, he is thus confirmed by Mrs. Kings; for

she states:—"She cannot remember the precise day, but it was about three weeks after her nephew's (the deceased's) death, that Plaisted called on her in the afternoon, and asked, 'where he could find Mr. Mearing?' (the party in the cause.) Plaisted was then quite a stranger to deponent; when he had inquired where Mearing lived, he said, 'I'll tell you what my business is with him, I have a will of a Mr. Unwin, and Richard Slater Young is the executor of it.' Deponent was much surprised at hearing him say so, and offered to accompany him to Young's lodgings."

This satisfactorily accounts for the will not being sooner produced, and repels any unfavourable inference on that score—nay confirms in the strongest manner the truth of the earlier history and the genuineness of the transaction. It is true that, at the funeral Brown read the will of 1819, but it appears from the evidence of Hardingham and William Kings, "that he was aware or expected that there was a will of a later date;" for immediately on the death he had made inquiries, and Gale then told him it was probable that there was such a will in existence, in consequence of the declarations of the deceased, that he would take care of his father and housekeeper.

It has been asked how Brown got this information: it might have been mentioned by the deceased to Gale, his intimate friend, and so might have come round: however that may be (as I set out with remarking,) the notion of fabrication is attended with such difficulties as hardly to be overcome: nothing could be more probable or less extraordinary than that he should have made this new will, and moreover the *factum* is established by direct and positive evidence;—I therefore pronounce for the will of June 1827.

I have great doubt whether I should rest here. Brown, the executor of a former will, does not stand on the exact footing of a next of kin—who has by law a right to the succession unless the deceased has directed his property should go in a different course: but Mr. Brown's interest is derived alone from the act of the deceased, and, if deprived at all, he is deprived of that which the deceased no longer intended him to possess: Brown never, after the wife's death, and the consequent renewal of affectionate intercourse, could have thought the deceased would leave his father destitute. Besides, he has made charges of fraud—I should hardly then arrive at the justice of the case, if I were to allow him to escape without the payment of some costs—but as he certainly has succeeded in damnifying the character of the drawer, I shall, in pronouncing for the will of 1827, only condemn Brown in *20l. nomine expensarum*: this will sufficiently mark the sense of the Court.

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In the Goods of SAMUEL HARVEY.—p. 575.

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*On Motion.*

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An engrossed copy of a will having been read over to, and approved by the deceased, who intended to execute it shortly afterwards, but was prevented by death: probate in common form granted (with consent of the only person interested under an intestacy,) of one of the originally engrossed sheets and of two fairly copied sheets substituted for, and, (except as to some clerical errors not affecting the disposition) corresponding with the sheets approved by the deceased.

*Dodson*—upon affidavits—moved for probate of a paper, without date or signature, under the circumstances stated by the Court.

*Per Curiam.*

Samuel Harvey died on the 4th of May 1828, leaving a brother—the only person entitled to his estate in case of an intestacy. The deceased by his will, dated the 14th of January 1825, after bequeathing 1000*l.* 4 per cents, to Harriet Boroman for life—then to her children—gave the residue to his brother, and appointed him an executor. Mrs. Boroman died in the deceased's lifetime, leaving ten children; and on the 8th of April, 1828, the testator took his will to his Solicitor, and directed him to prepare a new one, and thereby to give—100*l.* to each of Mrs. Boroman's children—the residue to his brother, and to name him an executor as before. On the 16th of April he called to execute this will, when it was read over to, and fully approved of by, him; but he said, he should postpone the execution of it till all the children were christened, which he would give directions to be done. The execution being thus delayed, and there being in the first two sheets (for the will consisted of three sheets) several clerical errors, not affecting the disposition, and also an unnecessary clause respecting real property, of which the deceased had none, the Attorney took the opportunity of having those two sheets reingrossed fair for execution. The children, it appears, were christened on the 20th of April; and the deceased died fourteen days afterwards, but without having executed the new will.

Probate is now asked of the substituted sheets, together with the remaining original sheet. In respect to these substituted sheets, they would be valid as copies; for one of the original sheets is not forthcoming. The disposition of the property is clearly, in substance and effect, the same as the will of 1825; and the brother too—the only next of kin—is willing that probate shall pass. The Court, therefore, directs the grant to go to the executors of the will, without date or signature, and with the substituted sheets,

Motion granted.

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WILLIAMS, formerly COOK, v. GOUDE and BENNET.—p. 577.

When the opinions of persons apparently intending to depose fairly are contradictory as to capacity, particularly as facts show the deceased was occasionally capable, the Court will infer a fluctuating capacity. The will of a person in such a state, of which probate was taken out four months after the deceased's death and not called in for two years and a half, pronounced for; there being satisfactory evidence of instructions, and of capacity, at the time of the *factum*; the disposition contained being consistent with his affections, and its variation from a will, executed before his mind became impaired, being accounted for by a change of circumstances.

The influence to vitiate an act must amount to force and coercion destroying free agency; and there must be proof that the act was obtained by this coercion.

A legatee performing the duty of an executor in proving a paper, is entitled to his costs out of the estate.

*Semble*, that an executrix (the widow) who—after taking probate and acting for many months under a will, by which she takes a smaller interest than by a former will—causes the later will to be opposed by questioning the deceased's capacity, and then refuses to propound such will, is liable to be condemned personally in the costs of a substituted residuary legatee who propounds and

establishes the will; and such refusal, being tantamount to renouncing, would justify the Court in revoking the probate, and decreeing the administration with the will annexed to such residuary legatee.

THIS case was argued at the sittings after Easter term, by the *King's Advocate* and *Dodson* for Mrs. Williams: and by *Lushington* and *Addams* for Mr. Bennet.

JUDGMENT.

SIR JOHN NICHOLL.

This case presents itself to the attention of the Court rather in a peculiar shape—a shape which at the outset, forcibly directs the Court in the view to be taken of the evidence. It may be proper to explain this peculiarity by adverting to some of the general facts before I proceed to the examination of the evidence, which more immediately regards the *factum* and validity of the instrument ultimately to be decided upon.

John Goude, the deceased in the cause, died on the 24th of June, 1822;—he had originally been a Sawyer in the dock-yard at Plymouth, and in 1792 married Margaret, now his widow, and one of the parties in this cause. He continued his trade for some time, but in addition took a public house which was managed by his wife, whence they removed to an inn called the Cross Keys, and finally entered upon the King's Arms Inn, or Goude's Hotel, the principal inn, posting house, and coach office, at Plymouth-dock, now called Devonport. Having some time before his removal to the latter house, abandoned his trade of Sawyer and assisted in conducting the business of the inns, he selected as his department at the King's Arms the posting and the coaches, seldom coming in doors except occasionally to carry in the first dish at dinners; but the management of the internal or house concerns was left entirely to his wife—the more active partner. The deceased was a good natured, easy, rather indolent, man, who loved his joke;—his wife a bustling, managing woman, and probably the profits of the business resulted in no inconsiderable degree from her exertions and care: indeed not only the domestic management, but a full share and proportion of the domestic authority also were exercised by her. The husband had a sister married at Devonport to one Cook, the carpenter of H. M. S. *Temeraire*, and this sister had three children, one of them, the present party, now Mrs. Williams. The wife also had a sister married to one Bennet, a shoemaker, residing and settled at Witney in Oxfordshire;—and she had at one period seven children, but at the death of the deceased only six—one of whom John Bennet is a party to this suit. For some time the daughter of Mr. Cook lived at the inn as bar-maid; but in 1813, in consequence of a misunderstanding, she left the situation, and in the same year Mary Bennet, a daughter of the wife's sister came to assist in that capacity: she fell into ill health—a decline—and in the spring of 1816 she died. It is quite clear that the deceased was very fond of her—was very anxious about her health and for her recovery—and much lamented her death. In October 1816 he adopted a nephew of his wife, Thomas Bennet, a lad of eleven or twelve years old—became fond of him—put him to school and played with him when at home. It also appears that about this time there was a misunderstanding with the Cooks: the quarrel might be principally between the wives, but whether the husband participated in the feelings, or only acquiesced in the wishes, of his wife, the fact is, there was no interchange of family kindness. The deceased might occasionally call on his sister, more espe-

cially to take leave of her when she was about to quit Devonport and go to Chatham; but there was no cordiality, nor the ordinary intercourse of affection after 1816.

In 1817—with matters in this situation—the sister's daughter having quitted her situation in 1813—no communication being kept up with the sister and her family—one of the wife's nieces having died in the deceased's house—a lad taken of whom he was fond—and, what is unequivocal—about twenty letters written by the deceased to Bennet and his family in 1815 and 1816, showing the strongest friendship and regard for them;—it is under these circumstances, I say, that the deceased sets about making his will.

The contents of that will it may be material to state. To his wife he gives 1000*l.* absolutely, and the residue of his property for life—after her death he bequeaths the residue equally between the children of his own sister Cook, and the children of his wife's sister, Bennet: at that time, Cook had three children, Bennet six; so that after the wife's death, the Cooks had one third, the Bennets two thirds: of this will John Bone and William Glencross were trustees and executors—it is formally drawn up, regularly executed and attested by three witnesses, another person of the name of Bone, Burnet and Hearle—of whom we shall learn more hereafter. The will, then, of 1817 (the validity of which is acknowledged) is very favourable to the wife and to her family: and though it does not cut off the sister's family, yet it gives no interest nor benefit to the sister herself—not even a slight legacy as a mark of affection. Attached to this will is a sort of codicil or direction in the deceased's own handwriting, signed, and attested by four witnesses; and the executors are those of the will. It is in these words:—

“Plymouth Dock 11th May 1819.

“This is to certify that neither brother or sister nephew or niece or any other person shall enter these or any other premises where my wife Mary Goude shall reside, or call her to account for any property or demand any keys or any other thing I shall leave after my decease. After my wife's decease my will to be acted up to by my friends Messrs. Bone and Glencross.”

This codicil, written before the capacity of the deceased is attempted to be impeached, shows his great affection for and confidence in his wife, how anxious he was for her comfort and gratification, and that she should not be disturbed in the enjoyment of the property—and whatever may have been her influence over the testator, it is not suggested that it was of a nature to vitiate the act: indeed it would be extraordinary if the influence of affection and of warm attachment is to take away the power of benefiting the object of that regard. The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further there must be proof that the act was obtained by this coercion—by importunity which could not be resisted;—that it was done merely for the sake of peace—so that the motive was tantamount to force and fear. I state the principles here, though they will be more applicable to a later part of the case: but to return to the history.

Thus stood matters in May 1819, except that in October 1818, the de-

ceased had taken another son of the Bennets—an elder brother—John Bennet (the present party in the cause) to assist him in his business. In the beginning of June 1819 the deceased had an attack of apoplexy: medical attendance was called in on the second of June, but it was not required after the 22d. The effects of that attack must be examined more particularly hereafter, but it is proved that before the end of June he was so far recovered that he attended a meeting of coach contractors at Bath, and appeared quite restored, at least in mind. Between that time and his death he went from home to various places—for we find him in London, in Sussex, in Cornwall—frequently on visits at Exeter to his friend, Church, a witness produced by Cook—on a visit to his friends at Witney and Woodstock in October 1820, in March 1821 and in September 1821;—in October 1820, accompanied by his nephew Thomas, who took this opportunity of seeing his own family for the first time since he went to Devonport in 1816;—in September 1821 accompanied by his other nephew, John, who was in ill health and went for a change of air;—but in March 1821 alone and unattended. These excursions were natural and beneficial to a person who had been once attacked by apoplexy; especially as these young men, the Bennets, were very steady, assisting him, when at home, in that department of the business which he himself conducted, and taking charge of it during his absence.

Here are various acts done respecting his property—various transactions of business both for himself and others—in October 1819, he executed conveyances and signed drafts for the purchase of certain dwelling houses in Princes Street Devonport—about the same time, October or November 1819, he became a trustee of Jackson's marriage settlement, and that upon the particular application of the parties—in 1821 he gave his consent as surviving trustee to an alteration in the property, and went himself over to Exeter and to Budleigh in June or July to transact in that character the necessary business; he continued to attend coach contract meetings, to correspond, to sign returns and warrants; but—a still more material fact because it bears a testamentary intention—he contracted to rebuild his inn: the contract was entered into in February 1821—the work was set about immediately—the first stone was laid about April 1821—the work was going on during the summer of 1821, and in February 1822 he executed a power of attorney to sell stock for the purpose of meeting the expenses of this building. His ordinary habits, so far at least as his body was concerned, were the same as before his apoplectic attack—he was about the stables and the coach offices and went occasionally over to Torpoint, where he also kept carriages and horses to expedite the mail; how far his mind was equal to give directions, or how far these acts were indicative of capacity I will presently consider. So again, as a commissioner for paving and lighting the town, he continued his habit of attending the meetings as before—but his speech had become rather thick and he was, at least occasionally, heavy and dull—so that he took no part in the discussion and might have made blunders in balloting—at present, however, I am only noticing the fact of his attending. So likewise in respect to public worship, he continued his habit of going there and attended on Sunday the 24th of June 1822, the very day of the second fit of apoplexy, which proved fatal. All these facts are incontrovertible: the state of his mental faculties and his testamentary capacity will be the chief subject of the remaining inqui-

ry; but I must first state the further testamentary instruments and the subsequent proceedings.

Here is a paper before the Court dated on the 7th of June, 1822, in the hand-writing of one of the nephews, but subscribed by the deceased:—

“King’s Arms Hotel Plymouth Dock  
7th June 1822.

“I hereby give and bequeath to Thomas and John Bennett (the offspring of William and Sarah Bennett of Witney Oxon) after the decease of my wife Mary Goude the inn and premises in which I now live, with the furniture, plate, carriages, horses and every other thing contained therein and belonging thereto, as also the carriages, horses, &c. at Torpoint and elsewhere. Also the houses, 6 and 7, in Princes Street with the stable and premises at the back. Likewise the coach house and premises over the coach house in Princes street and every thing thereto belonging.”

The signature is, as before observed, by the deceased and *prima facie* the paper is his act, but it is not attested. Here is another paper originally of the same date, all in the deceased’s handwriting, first signed on the 7th, but again signed and attested on the 11th of June: in substance this paper is the same as the one I have just read, but the commencement is different. It begins.—“I Francis Goude do hereby give, &c.” and at the end there is this clause:—

“Signed by Francis Goude this eleventh day of June in the presence of William Glencross and G. W. Hearle.”

Looking at the paper itself, without the evidence of the subsequent attestation, there are strong marks that it is the act of a free and capable testator, for it is his own handwriting—an easy running hand. It is stated that the wife declared this paper was written by the dictation of the nephew word by word and letter by letter: Foot—an attorney at Devonport—thus deposes on the 11th article.

“On the 27th of December 1823 Mrs. Goude unexpectedly called at his office, and told him she heard that deponent had been taking examinations as to the state of the deceased’s capacity for the purpose of setting aside the will now in question on behalf of the Cooks, and that she was anxious to inform him in what manner ‘the wills were prepared.’ Mrs. Goude referring herself to the paper in the handwriting of the deceased bearing date the 7th of June 1822 said, that Thomas Bennett drew up a paper (of which that of the 7th of June is a transcript) and submitted it to her for her approbation: that it being thought right by her and the two Bennets that the paper should appear to be in the deceased’s own handwriting, she and the two Bennets took an opportunity in private of getting the deceased to transcribe it: she said that Thomas Bennet stood over the deceased who was sitting at a table, and dictated each word and the letters contained in each word to the deceased one by one; spelling the word for him and telling him what letter to put next, and the deceased did so as he was desired, but it was accomplished with great difficulty.”

Now this is the account that Mrs. Goude gave to Foot at the latter end of 1823: it is no evidence of the fact as against Bennet, more especially considering the time and circumstances under which that declaration was made, because it was at a time and under circumstances when she

had an inducement and an interest so to declare;—but the instrument itself falsifies the declaration: not only is it not an exact copy of the other paper—not only are the words and expressions in some places varied, but the writing itself is so free and continuous—so manifestly written, as it is termed, *currente calamo*, that it is quite incredible it could have been written by an imbecile and unwilling person, having the letters dictated to him letter by letter—being unable to copy on account of his idiocy and fatuity,—it is manifestly the writing of one possessing at least a certain degree of intelligence; and this story of the wife's is therefore in my judgment utterly false.

Passing by then for the present the evidence of the execution and attestation of this paper of the 11th of June, I will proceed to state the substance of the instrument now propounded. It is dated on the 14th of June, 1822, formally drawn on two sheets of paper, signed, sealed, and attested by two witnesses; it gives the whole of his property to his wife for life—but for life only: the 1000*l.* given absolutely to her by the will of 1817 is omitted, and therefore this instrument is so far less beneficial to her: it is an absolute loss to her of this sum—at her death it gives to his two nephews and his niece the Cooks 100*l.* each—to William, Francis, and Charles Bennet 100*l.* each, and to Sarah Ann Bennet 200*l.*—it bequeaths the residue to John and Thomas Bennet, and on the death of either of them without issue to the survivor; if both die without issue then to the other four Bennets;—so that though the whole residue after the wife's death is to go to the Bennet family, yet the two nephews, John and Thomas, are selected for a much larger interest than the other four Bennets. Mrs. Goude, William Glencross, and John Bone, are the executors of this will.

These are the contents,—and the deceased died by a fit of apoplexy on the 24th of June, ten days after. Mr. John Bone, the executor, states on interrogatory, that on the day of the funeral “he read the will aloud in the presence of the party that had attended the funeral: he did not hear any remark or observation made on such occasion which expressed or indicated a doubt that the testator was not competent to make the said will at the period at which the same bears date:”—this is not an immaterial fact in the cause.

On the 15th of October, 1822, Mrs. Goude was sworn as executrix, a power of being joined in the probate being reserved to the other two executors. On the 8th of March, 1823, about six months afterwards, the two other executors renounced. Now I do not know in what way that renunciation was given; if, in person, they must have sworn that they believed it to be the will of the deceased; if, by proxy, then the proxy, unless specially framed, must have recited that it was the deceased's will.(a) So that after this renunciation Mrs. Goude became sole acting executrix of this will; she continued acting under it without any question being suggested till the latter end of that year, 1823, when either on some disagreement between her and the nephews, or on her attempting to sell money out of the funds too freely, a *distringas* was taken out to restrain her: then it was that Mrs. Goude found out that this will was good for nothing, that the deceased was incapable, and that it would be advisable to revert to the will of 1817, with the codicil of 1819,

(a) It was here stated by Counsel that the renunciation was by a proxy in the ordinary form.

which were more beneficial to herself. The question, whether the deceased possessed testamentary capacity or not, now became a subject of public discussion at Devonport, and on the 27th of December, 1823, Mrs. Goude paid the unexpected visit to Mr. Foot (who as a solicitor had taken up the cause of Cook—an old servant of his), represented to him the incapacity of the deceased and told him the story about Thomas Bennet's dictating each word and each letter in the paper of the 11th of June, as already stated.

Still however the matter was not actively followed up: these parties did not feel their courage and their sense of the justice of their case sufficiently strong to commence the suit; so that the probate was not called in till the spring of 1825, and then the wife brought it in, but refused to propound the will though she had been sworn to and acted under it for two years and a half: Bennet, therefore, as the substituted residuary legatee, was obliged to propound it, and Cook, (now Mrs. Williams), as the substituted residuary legatee of the will of 1817, opposed it. The suit—a very long and a very expensive suit—proceeded; and sixty witnesses have been examined, some at Devonport, and some (brought up on purpose) in London.

Before the first witness was examined, three years and a half had elapsed since the death of the testator, and during a great part of that time this will and the capacity of the deceased had been a common topic of discussion at Devonport: here then is the explanation of what I meant by the peculiar shape in which the case presented itself for considering the evidence. Where a length of time has been suffered to elapse, witnesses even to facts will be inaccurate, and the Court must be prepared for variations in the relation of circumstances by the most credible and the most respectable,—but what is the Court to expect upon matters not of fact, but of opinion, when parties have enlisted themselves as it were on one side or on the other? This case is peculiarly open to this inconvenience. In all cases of opinion as to capacity, the Court invariably finds conflicting evidence—the person is seen at different times and under different circumstances: but on the present occasion the deceased's state of health would more especially lead to contradictory evidence. The very nature of an apoplectic habit is to produce fluctuation—it is a tendency of blood to flow to the head, necessarily affecting the brain and inducing lethargy. Cold, indigestion, fatigue, and various other causes will increase its operation and produce a more than usual dullness and stupor. Art, and sometimes nature alone, will afford relief: bleeding, cupping, leeches, medicine, will restore activity to the brain; and it appears that in this case recourse was had to such and similar remedies. Lunn deposes thus:—"One evening, a moonlight night in October next preceding his death, the deceased was standing at his inn door, when deponent passing by asked him how he did? deceased for a few seconds did not recollect him: at last he said 'Is that Bill?' and in a silly half-witted manner," [that is his construction] "without other preface, said, 'They tell me I'm to be cupped to-morrow.'" If then, on a moonlight night, the deceased did not know Lunn, yet he remembers that he is to be cupped. Another witness, Bone, says; "after deponent ceased to attend, Mrs. Goude used herself to insist upon the deceased submitting to have a blister applied or to be bled with leeches."

These remedies would not have been resorted to unless they had afforded temporary relief and rendered the deceased different at different

times; and almost all the witnesses describe him as subject to great fluctuation—sometimes he was dull and stupid, and hardly knew what was going on, especially if there was nothing to excite him, as when he attended the committees—at other times, he was lively and boyish—sparing and playing at cudgels with this lad, Thomas Bennet, of whom he was so fond—sometimes he played his game at whist well—at other times he revoked frequently in the course of the evening: hence I am satisfied that the condition of the deceased varied materially.

There are a multitude of witnesses, examined on each side to the article as to capacity,—above twenty: there could be no difficulty in obtaining any number, for the deceased was the master of the great inn of the town, was constantly about the stables and coach office, and was living as it were under the public eye: but what does that very fact infer?—that he was not in a constant state of stupor and imbecility. A great number of the witnesses however describe the deceased as being in a state of absolute fatuity and idiotcy—others assert that his mind was not at all deteriorated—others again take a middle course. Where opinions are so contrary and there is no reason to suppose that they are not sincerely given, the Court can only reconcile them by supposing that his capacity fluctuated; but I may at the same time judge a little of the credit due to the different opinions, from observing how the facts are laid. Here is Cook's allegation stating a broad fact which is either true or false. The fifth article pleads:—"That in or about June 1819 the deceased was attacked with apoplexy or some illness of that or a similar nature, so severely, that for the space of about three months he was in a state of continued delirium and derangement, and being also at times violent, it was found necessary not only to watch him continually, but occasionally also to subject him to personal restraint."—Again, in the tenth article:—"The deceased was not at any period from and after the month of June 1819, and more particularly during and after the winter preceding his death of sound mind, memory, and understanding, capable of managing himself or his affairs, or of forming a judgment as to the disposition of his property by will, or of giving instructions for and making and executing his last will and testament or a codicil thereto, or of doing any testamentary act whatever."

Here then is made an assertion of actual derangement for three months, and of incapacity from that time till his death. This (if there be not some clerical error) is an assertion most directly falsified: for the attendance of the medical person ceased on the 22nd of June, and we find the deceased at Bath upon business and with his intellects quite perfect at the latter end of that month: here then is a completely false averment as to a matter of fact. Let us see again how the witnesses are carried away by their prejudices. Mr. Foot, for example, on the tenth article deposes that the deceased was for six months "quite an idiot;" and no doubt this was his sincere opinion: but on examining the grounds of his opinion the Court finds that he has literally none:—

"He frequently saw the deceased in the course of the last twelve-month of his life, and within three or four months of his death, not frequently at the King's Arms, but generally out of doors meeting him casually. Deponent commonly spoke to deceased when he met him, merely asking him 'how he did,' but not conversing with him: the deceased's memory appeared to be quite gone: from the vacancy of his look he does not believe he recognized him: the deceased, in his manner and

appearance (for the last six months of his life) at the times deponent happened to see him, was quite an idiot,"—and at the conclusion of his evidence on that article, he says—"his belief is founded on general observation of the deceased as aforesaid: he had not any opportunity of specifically determining on the powers of the deceased's mind during the time deposed of."

So that meeting this person in the street, merely from his appearance, without any opportunity of conversing with him or of ascertaining the state of his mind, Foot ventures to assert, that the deceased was an idiot. This was the more incautious, for he himself has admitted that there were differences of opinion as to the testator's condition—and not, as was argued, that his imbecility was known to and believed by all Devonport. Dr. Magrath on the 11th interrogatory says:—"As a reason for applying to respondent, Mr. Foot said that a difference of opinion had arisen respecting the capacity of the deceased."

Foot, therefore, instead of telling Magrath that he was a perfect idiot, says, as seems to be the truth of the case, there was a difference of opinion at Devonport: so there is in the evidence in this suit as in many others. Bone's evidence is still more extraordinary, and so utterly irreconcilable with his conduct, that I shall rely rather on the latter than on the former: he says on the fifth article—"The deceased was during the last year of his life in a state of absolute fatuity:" those are his words—yet this Mr. Bone—the medical attendant of the deceased—the executor of the will of 1817—who ought to have protected the interests of the Cooks under that will—after the funeral reads the will of 1822—makes no remark—suffers the widow to take probate—and again recognizes the validity of the latter will, by renouncing probate. It is true that the Cooks were at the time absent from Devonport, but they were natives and had long resided there, and must have had friends to apprise them of what was passing. "If the deceased were quite an idiot," as Foot represents, or in a state of "absolute fatuity," as Bone would make him—if he were incapable even for the last month, (since he was about his inn-yard and the town, and at public worship as much during the last month as during the last year, his death being quite sudden from his second fit) it must have been notorious to the whole place—it must also have been notorious that his wife was committing a gross fraud:—there could be no difference of opinion such as Foot mentioned to Magrath.

Without then minutely detailing the opinions of the witnesses on both sides and reasoning upon each, it is sufficient to state that here is a great conflict of opinion, which, I repeat, is no novelty in such questions: some, as I have said, were of opinion that he was decidedly incapable—some, that his capacity was in no degree affected—others that though capable his mind was shaken: the just result is that his faculties were in a degree damaged and deteriorated—but that he was not intestable—that his capacity was so far impaired and fluctuating that the Court would require more than the mere fact of execution—would require satisfactory evidence of instructions—and proof of volition and intention.

In respect to the influence of the wife, there is little visible that would not equally apply to the will of 1817, or that was not equally in operation at both times: there was the general influence of an active, bustling, high-spirited wife over a good-natured, easy, husband: in consequence of his attack it was necessary she should take a still more decided lead in

the management of the concerns of the house: it was necessary she should, as a kind nurse and an affectionate wife naturally would, insist on his going to bed at his regular hour—on his not indulging too freely in liquor—on his putting on a blister or being cupped, when symptoms of a determination of blood to the head showed themselves: it was fit she should desire he might not be contradicted nor irritated—and should encourage and press him to take little excursions from home to change the scene, and for the sake of exercise; but I can find no trace of any unfair importunity, on the part of the wife, to induce him to alter his will or to do any testamentary act. The general influence arising from his affection and deference for, and from his wish, in the disposition of his property, to gratify and to please, a wife who was the principal means of acquiring that property, she undoubtedly possessed; but that, as I have already observed, will not vitiate the testamentary act—there must be proof of something amounting to force and coercion in the obtaining of the act itself.

Proceeding then toward the testamentary act itself—is there any thing in it inconsistent with the deceased's probable mind and wish? so far otherwise, that the change of circumstances since the will of 1817 renders the alteration in the disposition quite natural. In 1817, though he was partial to his wife's relations, there was no particular branch of them that he should select to favour, and therefore he gives the share of the residue equally among the wife's sister's children: but now these two nephews had been with him for four years—he was very fond of them—he speaks of their conduct as being remarkably good and very steady—they assisted him greatly in the management of his concerns—and relieved him from what in his state would become irksome—he placed great confidence in them, and though he liked to be about as if occupying himself, yet it was natural that he should be pleased with these youths releasing him from a closer attention to the real burthen and labour of his business.

But the case does not rest here—and on mere inference. It is clear that he proposed to introduce these youths into the business and to make them his successors: he had already allowed their names to be put on some of his carriages as a reward of their past and an encouragement of their future attention and steadiness: it is pretty clear too that the rebuilding of his inn was for their benefit and with a view to their succeeding to it after his wife—and this was not, as asserted, the mere act of the wife, for declarations to this effect came from the deceased himself—he had talked of retiring from business and going to reside at Witney: at his time of life and with his infirmities it was not likely that he, or his wife for him, should undertake the rebuilding of this great inn unless with a view to the interests of these young men. What then is the evidence on this head? it is a material part of the case in support both of capacity and of testamentary intention, and leading up to this new will.

The first witness is Ann Dawe—who was a bar-maid in the house up to 1820. She states—“that Mr. Goude was always extremely fond of the two Bennets: she has many times heard the deceased talk about retiring from business: he said, he should not have remained in it so long were it not that he wished the Bennets to be quite qualified to succeed him.”

The next witness is Mr. Ratcliffe, a wine and spirit merchant: “The deceased was very fond of the Bennets: he was most partial to Thomas, the younger one, who was a very sharp boy: the deceased seldom moved

without him: deponent has heard the deceased talk about retiring from business, and he gave it to be understood that the Bennets were to succeed him: he cannot fix the time when he heard the deceased so express himself: he recollects having seen the names of both the Bennets painted on the Fly Coach which ran between Devonport and Exeter, coupled with the name of the deceased."

Isbell, a statuary, gives his evidence in these terms:—"Accidentally coming to the deceased's inn about dinner time he has sometimes dined with the deceased and his wife and the two Bennets in the bar: the deceased treated John and Thomas Bennet like his own children: deponent, from general expressions used by the deceased, made up his mind that the two Bennets were to succeed the deceased in business whenever he retired."

Welch, the agent of an insurance office, thus deposes:—"The deceased said he had some thoughts of pulling down the inn, and was in treaty with Mr. Coles for an adjoining house in order to have an archway, or carriage entrance to his inn. Deponent replied—"Mr. Goude, had you not better at your time of life reflect before you enter upon such a business, especially as you have what is very handsome; and no children to provide for." The deceased answered, 'that he had nephews whom he should bring into his business.' The conversation then dropped, the deceased having in the opinion of the deponent given a very sufficient reason for undertaking the alterations proposed."

Bennet, the father of the party, though not entirely to be relied on, yet not wholly to be left out of the question, says:—"The deceased was very much pleased with the deponent's sons John and Thomas whilst they were with him: he always expressed himself to the deponent, both personally and by letter, as being much pleased with their steadiness and attention to his business, and used to say that it would be a nice business for them when he left it off."

A sixth witness, Mr. Waterhouse—the great coach proprietor living in Lad Lane, London, and therefore free from the party prejudices of Devonport, states:—"That in or about July 1819, the deceased, in speaking to deponent of the Bennets, described them as two nephews of his wife who were living with him, and that they were nice sharp lads, and very attentive and useful to him in his business: that on another occasion, a short period afterwards, the deceased spoke to him again of these two nephews, and of what he intended to do for them: he observed that, after taking care of his wife he had taken care, or should take care (deponent is not certain which) of her nephews."

Jackson, to whose marriage settlement he was a trustee, confirms the other witnesses:—"He has repeatedly heard the deceased express his satisfaction with their conduct and attention, and say, how well they conducted themselves: the deceased has mentioned to deponent that he intended to retire from business; he did not say when, but added, that when he did he should leave his house and business to John and Thomas Bennet. The deceased, about the latter end of 1820 or beginning of 1821, obtained a renewal of the lease of his house for the purpose of rebuilding and enlarging it; and he expressly told deponent at such time, that he was doing it for the two boys."

Here then is a mass of declarations coming from the deceased himself, manifesting not only capacity, but an intention to select these two nephews as the principal objects of his bounty, and consequently to make

a new disposition differing in some degree from the will of 1817, particularly as to the substituted disposition of the residue.

I come now then to the execution and attestation of the paper originally dated on the 7th of June, but which was again signed, and was attested on the 11th. Hearle, a bookseller, intimately acquainted with the deceased, his opposite neighbour, and one of the attesting witnesses, gives this account:—"Early in June 1822 the deponent received a message from the deceased, that he wanted to speak with him: he accordingly went and found the deceased and his wife together in the bar parlour: he cannot now recollect whether Mr. Glencross was then there; if not, he came in shortly afterwards. The deceased himself produced to deponent and to Glencross a paper in deceased's own handwriting, and referring to it, said, he wished deponent and Glencross to witness it: there was no other introduction of the business: the deceased then either read the paper over to them, or gave it them to read: he cannot recollect which, but he recollects the fact that, at such time, deponent knew the contents of the same. The deceased then signed his name to the paper (which purported to leave his house, carriages, horses and furniture to his wife's nephews, John and Thomas Bennet) and afterwards deponent and Glencross. The deceased then requested deponent to take care of the paper, so he took it home with him, and enclosed it in an envelope and endorsed it as a codicil to the deceased's will: he so endorsed it, because in 1819 he and a Mr. Burnet witnessed the execution of a will made by the deceased, the tenor whereof he was not acquainted with, save that in the course of general conversation between the time of the execution thereof and of the paper or codicil aforesaid, the deceased had several times mentioned that thereby he had left his property to his wife for life, and afterwards to his own and his wife's relations. During the time deponent and Glencross were with the deceased (as aforesaid) either deponent or Glencross recommended deceased rather to make a new will altogether, by which his intentions might be clearly ascertained, than to leave separate papers or codicils which might be contradictory to his will or one from another. No remark was at that time made in answer to such recommendation."

This is the account given by Mr. Hearle, and Mr. Glencross confirms it:—"On the 11th of June 1822, a message was brought to deponent, in consequence whereof he went over to the house of the deceased. He went into the bar parlour of the inn, and he found there (as he now best recollects and believes) the deceased—his wife—the younger Bennet and Mr. Hearle: deponent cannot recall to mind whether it was the deceased or Mrs. Goude who informed him of the business on which he had been sent for: he verily believes that the paper writing (to be deposited of) was taken—but by whom he cannot recollect,—out of a bureau in the said parlour. The deponent cannot recall to mind the conversation that took place previous to the execution of the paper; but he recollects having expostulated with the deceased (and he believes on this occasion) on the subject of the disposition of the deceased's property to the prejudice of Mrs. Cook and her family; and that he also earnestly recommended the deceased to have his will drawn up by a professional man, which the deceased consented to have done, and he and Mrs. Goude authorized deponent to consult a professional gentleman on the subject: he so advised the deceased not because he was aware there were other testamentary papers of his in existence (which he did not

know) but because of the apparent informality of the paper then produced."

He says in a further part of his evidence:—"The deceased on the 11th of June 1822 was of sufficiently sound mind, memory and understanding, in the opinion and judgment of deponent, to give directions for the disposal of his property."—This witness must be expected to speak cautiously, not only from the distance of time, but from the conversations at Devonport in regard to the capacity of the deceased. On a further article he says:—"it was either on the said 11th of June, or immediately afterwards (he rather thinks it was on the 11th of June) that he endeavoured to persuade the deceased to bequeath part of his property to Mrs. Cook and her family; who, on such occasion, gave deponent to understand, 'that they had not behaved to him as they ought to have done, and they could not expect any thing from him.' " I may also notice that in the will of 1822 he does not give his sister, Mrs. Cook, even an honorary legacy, but passes her by altogether.

There are other parts of Mr. Glencross' evidence to which my attention has been called on both sides, but having considered them I do not think they materially vary the effect of his deposition in chief.

This paper, then, of the eleventh of June and the evidence in support of it—the declarations of the deceased, at the time, of his intentions favourable to the Bennets and adverse to the Cooks—the intention also of having a more formal will prepared, are strongly introductory to the main instrument at issue: here is no appearance of any importunity or interference on the part of the wife—here is no appearance of fraud or clandestinity—Mr. Glencross was the last person to be sent for with such a view—he was the intimate friend of the deceased, the executor of the former will—he interfered in favour of the Cooks though without success: and the facts which he states prove the deceased to have been a free and intelligent agent.

After what had passed on the 7th and 11th, it was the natural and probable sequel that a formal instrument embodying the whole of the deceased's testamentary intentions should be executed. To save the expence of a lawyer, Mr. Hearle was requested to prepare a will, and he reluctantly consented. His account is:—"Within a week (after the 11th of June) deponent in passing through the inn yard was met by Mrs. Goude, who said 'she wanted to speak to him:' he accompanied her into the bar parlour where the deceased was: Mrs. Goude then asked deponent (no one else being present) whether he would draw up a will for the deceased according to the suggestion given them the other day; and the deceased then himself requested deponent to do so. The deponent said 'it was quite out of his line to draw wills, and as there was a good deal of property at stake, a professional man should be applied to.' Mrs. Goude replied 'that the making the last will (done by a Lawyer) had cost so much money that they would rather have deponent to do it:' he again declined; but the deceased and his wife again pressed him, and he at last promised to do it: Deponent then asked the deceased, 'how he wished to leave his property?' the deceased then answered, 'that he wished his wife to have the enjoyment of the whole during her life, and at her death, that it was to come to John and Thomas Bennet equally between them.' "

Now this comes entirely from the wife, and her benefit is much less under this will.

“Deponent enquired of the deceased ‘who he would name for his executors:’—deceased asked him whether he would be one; deponent said he had rather not, but that as the deceased had appointed two very proper persons (Mr. Glencross and Mr. Bone) in his former will, he recommended him to name them again: the deceased said, ‘they should be his executors jointly with Mrs. Goude,’ and upon deponent’s asking him why he had not named his own relations, he answered ‘that they had had enough already, and that they were not upon terms:’ the deceased said, he would leave a £100 to each of his sister’s children, which legacy to Margaret Cook, one of said children, at the suggestion of Mrs. Goude and the deponent, the deceased said he would increase to 200*l*.”

This certainly is a mistake of the witness, because only 100*l*. is left to this Margaret Cook: there is 200*l*. left to Sarah Bennet, which may account for his misrecollection. It removes one observation as to the influence of Mrs. Goude; but, at all events, is not sufficient to affect the credit of the witness. Hearle returns to his shop to prepare the will, in the course of which he is backwards and forwards communicating with the deceased. Thus, “finding the deceased had not provided against the lapse of the interest, deponent went over to inquire how, in case of the death of the Bennets, or of Mrs. Cook’s children, their shares were to be disposed of. The deceased said, ‘what was left to the two Bennets should go to the survivor in case of either dying in his wife’s life-time:’ deponent asked, ‘what, if the one so dying should have married and left issue;’—deceased answered, ‘that such issue should have the father’s share, and that if both Bennets died in his wife’s life-time, then what he had left them should go to the rest of the Bennet family:’ the deceased at the same time said, ‘that the legacies left to Mrs. Cook’s children should, in case of any of their deaths, come back to his estate; that is, should lapse.’ Deponent cannot be certain during what part of the foregoing conversation (which all took place within three or four hours in the afternoon) Mrs. Goude was present: she was continually in and out, and when she was not there, deponent was the only person with the deceased. Two or three times John and Thomas Bennet came in, but they were by the deceased immediately ordered to leave the room. In the course of the same evening and following morning the deponent, (with the assistance of a book which contained forms of wills) drew up, from his own memoranda of the instructions, the will; and after breakfast, took it to the deceased, who, with his wife together looked over the same, and both declared, ‘it was the very thing they wanted.’”

This witness afterwards goes on to the proof of the execution.<sup>1</sup>

Unless then this witness is deposing with direct and wilful falsehood, here is full proof of instructions, approval, and execution, leaving no doubt of volition and testamentary capacity: Hearle could not be deceived—he had been acquainted with the deceased for eighteen years—was his opposite neighbour—a respectable bookseller—had attested not only the paper of the 11th of June with Glencross—but the will of 1817. He speaks to capacity at the time of executing in these terms:—“Deponent was very particular in satisfying himself and did fully satisfy himself of the perfect capacity of the deceased on the several occasions by him predeposed of, because between the period of the deceased executing a will in 1819, and deponent being called in to witness the codicil in June 1822, the deceased had suffered a severe illness, the consequences of which caused temporary aberrations of mind; and this being known to

deponent he was very particular in assuring himself, which he did, that the deceased was quite free from any access of such complaint before he witnessed the said codicil, or took instructions for, or made, or witnessed the execution of the will aforesaid."

He is confirmed sufficiently to show execution and capacity by the other subscribed witness, Symons, also a respectable person, a mercer—an intimate acquaintance of the testator—who has given his evidence with perfect fairness. There are those variations as to minute circumstances which a lapse of upwards of three years would naturally produce between honest witnesses, but Mr. Symons' evidence is quite effectual to that part of the transaction at which he was present. What he states, previous to the execution, is shortly this:—"that on the evening on which the will was executed, Hearle called upon him and they went together to Goude's; that in the bar room they found the deceased, his wife, and a stranger; that in a few minutes they went with the deceased into a back parlour, Hearle bringing the will with him, who opened it, and laid it on the table; that he does not recollect any conversation or remark upon the subject of the will previous to the signing; and that the will was not read in his presence." Here are certainly, in this account, some variations from Hearle, but not such as to affect his credit. (a) The witness then—after deposing that the deceased of his own accord signed each sheet; (Hearle states that he had with a pencil written the names where the deceased and the witnesses were to subscribe) placed his finger on the seal of wax; repeated, by Hearle's directions, the form of publication; and that Hearle and himself then wrote their names—thus continues:—"Immediately after the deponent had signed his name, he said to the deceased, 'Well Goude, do you know what you have done?' The deceased answered 'O yes, man.' Deponent then said, 'Is it all right?' Deceased answered 'O yes, my dear fellow, it's all right.' Deponent replied, 'So long as you know what you have done, it is of no consequence to me.' This short conversation took place in their way from the back parlour to the bar parlour, to which they returned immediately on the execution of the will being finished. After the will was so executed, Hearle folded it up and took it with him back to the bar." . . . . "At the time of the execution the deceased was of sound mind memory and understanding; he founds his belief of his capacity on the manner and conversation of the deceased at the time of the execution of the will, and his behaviour and conversation subsequent thereto in the same evening; for deponent remained in the bar parlour for two hours more, and played a rubber with the deceased, during which time he discoursed rationally and sensibly as much so as at any time during deponent's acquaintance with him."

This is the evidence of the *factum* and of the capacity—viz. these

(a) Hearle stated, "that about 9 o'clock in the evening, in consequence of a message, he went over to the deceased, and found him, Mrs. Goude, and several friends, in the bar-parlour. Mr. Symons was either there at the time or came in shortly afterwards. . . . The deceased asked his wife for the will, or for the keys of the bureau wherein it was kept, and the deceased, (bringing the will with him) Symons, and deponent went into the old back parlour: the deceased then told Symons (who appeared to be a stranger to the purpose he was come about) that he had sent for him to witness his, the deceased's, will. . . . Symons read over the will to himself, and afterwards, as deponent now best recollects and believes, read the same aloud to the deceased."

three witnesses, Glencross, Hearle, and Symons, speaking to these transactions on the 11th and 14th of June. There is no particular illness at this time—the deceased was going on just as usual—and Glencross, both in his evidence now and in a memorandum made at that time, records that on the 11th of June the deceased appeared in better health and spirits than usual; and here, on the 14th, after the execution, he plays his rubber of whist with Mr. Symons: he lives about ten days after—not in a gradually declining state, but on Sunday, the 24th, he goes to his usual place of worship—is suddenly struck with another fit of apoplexy and dies,—the funeral takes place—the will is read by Bone—no suggestion of incapacity is raised—the widow takes probate—acts under it for nearly three years—and if she had not been disturbed by the *distringas*, it is probable that this suit would never have been heard of.

It will be obvious from what has been stated that the Court thinks itself bound to pronounce for this will. The substituted residuary legatee, Bennet, having performed the duty of an executor in proving this will, according to the ordinary rules of the Court is entitled to his costs out of the estate. If the costs are to be paid out of the estate they will in some measure fall ultimately upon him as substituted residuary legatee, though more immediately on the widow, the residuary legatee for life: she has acted a most improper part, and it is not improbable that she has been the occasion of this expensive suit: possibly, in strict justice, she ought to be condemned personally in the whole of Bennet's costs—at any rate, as she has repudiated the will by refusing to propound it, which must be considered as tantamount to renouncing probate, the Court is of opinion that it is warranted in revoking the probate granted to her, and may now grant administration with the will annexed to Bennet, the substituted residuary legatee, and decree his costs to be paid out of the estate. If the widow is content with that course I shall feel inclined not to carry my sentence to the rigorous extent of condemning her personally in Bennet's costs, trusting that the decree I propose to make may be sufficient to check such a proceeding in future.

I therefore at present only pronounce for the will of the 14th of June 1822, reserving the question as to costs; as to the probate taken by the widow; and to the grant of administration, to a future day: but I must consider this as a most lenient course towards the widow.

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On the 4th session, the Judge, on the motion of Counsel, at the petition of the Proctor for John Bennet, with the consent of Mrs. Goude, the widow, revoked the probate remaining in the registry of this Court heretofore granted to her, and declared the same null and void, and decreed letters of administration (under the usual security) with the will of Francis Goude annexed, to John Bennet the surviving residuary legatee therein named; and directed his expenses to be paid out of the estate.

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### DODGE v. MEECH.—p. 612.

The asserted will of a person of fluctuating capacity,—(totally abandoning the principles of a former disposition, made before the deceased's faculties were impaired and long adhered to)—pronounced against; and the executor—the

person principally benefitted—who, among other things indicative of fraud, had himself given the instructions, and whose son, a minor, alone spoke to the execution—condemned in costs.

*Phillimore* and *Dodson* in support of the will of the 12th of July 1826, propounded by William Dodge.

*The King's Advocate* and *Lushington* contra.

JUDGMENT.

Sir JOHN NICHOLL.

This case is so clear that I can entertain no sort of doubt as to any part of my sentence, and I should not be justified in taking any further time or putting the party to any further expense in respect of this will.—The facts of the case are these.

Joseph Dodge died on the 21st August 1826: he had made a will in 1820, which he copied pretty closely with his own hand and re-executed in October 1824. The contents of that will are not unimportant—they give the history of the deceased and of his family, and explain the grounds on which the Court will proceed to the decision of this question.

“ This is the last will and testament of me Joseph Dodge formerly a linen-draper, but now retired from business and residing at Marston Magna in the county of Somerset I give and bequeath all my money securities for money and personal estate of every kind and denomination whatsoever unto my friends Benjamin Vowell of Sherborne wine-merchant Thomas Fooks of the same place gentleman and Thomas Vaughan Meech of the same place ironmonger but nevertheless upon and subject to the trust hereafter expressed and declared concerning the same that is to say after they shall have obtained payment of the securities and reduced the whole into money and shall have fully paid and satisfied all my just debts, funeral and other expenses and the cost of proving and otherwise relating to the due execution of this my will and the several legacies following that is to say 200*l.* to my niece Martha How daughter of my sister Martha Coombs 200*l.* to my niece Betty Baker daughter of my sister Betty Lawrence 100*l.* to my niece Julia Wetherall daughter of my late brother John and the like sum 100*l.* each to her sisters Mary and Betty. 50*l.* each to my nieces Betty Hester and Mary daughters of my brother William which I give them as a token of my regard persuaded that their father has made a comfortable provision for them and the sum of 1000*l.* to Elizabeth Martin who now lives with me provided she shall continue to be so residing with me at the time of my decease but not otherwise then the trust as to all the remainder of my money and personal estate to distribute and divide the same to my nephews Benjamin Dodge son of my late brother Benjamin Robert and Joseph Dodge sons of my late brother John Dodge and to William Coombs son of my late sister Martha Coombs and Joseph Lawrence son of my sister Betty Lawrence in equal shares and proportions and I hereby nominate and appoint my said three friends Benjamin Vowell Thomas Fooks and Thomas Vaughan Meech joint executors of this my will,” &c. &c.

He signs this document—there is the seal; the usual attestation clause, and two witnesses: at the bottom is written—“ That there may be no mistake you are to understand it is the sum of one thousand pounds I have here given Elizabeth Martin;” and, on the opposite side, are these words:—“ that there may be no mistake”—so that he is particularly anxious that Elizabeth Martin, his housekeeper, whom he had bred up from a child

of six or seven years of age, and who had lived with him above thirty years, should have this 1000*l.*—nor is this all—he had, as I have said, executed in 1820 a will nearly the same, prepared by his confidential solicitor and executor Fooks, which having recopied as his new will he cancels, and in the following clause, written at the bottom in his own hand, he assigns the reason of taking this step:—"I drawd out my will afresh because the name Betsy Martin was put in this will and it should have been Elizabeth Martin."

Now nothing can more strongly show that the former will was confirmed and copied—that he was not acting under any hasty impulse of feeling—but that the will of 1824 was the deliberate expression of his wishes—it shows also what was his general intention as to the testamentary disposition of his property,—it shows that he had a great number of nephews and nieces whom he meant to benefit in different degrees and for different reasons; but William Dodge, the party bringing forward the present question, is not mentioned in this will and takes no benefit under it. It is clear he had once been a favourite with his uncle, who conferred considerable benefit on him during his lifetime, and had turned over his business to him: William Dodge had not however conducted it with the same success as the deceased, nor in a manner likely to afford him much satisfaction—he was exposed to arrest and was supporting his credit by accommodation bills—the deceased had also just before he re-executed this will, given him up and discharged him of a bond for several hundred pounds which this nephew then stood indebted to him. These were the reasons why he was excluded under this will—admitted to be valid, unless revoked by a later instrument.

To this will there are several codicils, one dated on the 11th of January 1822:—"I hereby give unto Joseph Dodge son of my nephew William Dodge my watch and my large family Bible and the six volumes of Henry's Exposition upon the Holy Scriptures and I give unto William Dodge the son of my nephew William Dodge the eight volumes of the Rev. Mr. Romain's works."

"The Concordance return to Robt. Dodge."

There is another dated on the 19th of October 1824, which was originally signed on the 23rd of September: the date I presume was altered when it was witnessed by Hannah Taylor:—"In addition to what I have already given to Elizabeth Martin (now living with me) upon my will I hereby give her (if she lives with me till I die) *all* that is the whole of my household goods and furniture except one dozen of silver teaspoons:"—At the bottom is written—"I hereby give unto Jemima Gould formerly Jemima Maber one dozen silver teaspoons marked in the front J. D."

"October 19 1824."

A further paper: "I hereby give unto Wm. Dodge son of my late brother Wm. Dodge the ten volumes of Doctor Hawker's Poor Man's Commentary upon the Scriptures."

"October 21 1824."

Here are two further papers signed and dated; the first is dated January 27, 1825:—"It is my desire and will that if I should be indisposed to act in life by any affliction I desire Elizabeth Martin may have the care of me but if Elizabeth Martin should not have the care of me, then allow her eight shillings per week for my lifetime and at my death give her what I have given her upon my will."

This was after the deceased was ill, and after he had taken to the excessive use of intoxicating liquors, and after Gray had begun to attend him. It seems to refer to his illness and to express an apprehension that he should not be allowed to be attended by Martin: this is a little inconsistent with the averment that Martin was beginning at that time to use personal violence.

The other paper is after he got to Sherborne; and is dated March 8th, 1825:—"If it should please God I should die at Sherborne as Mr. Vincent made my brother's coffin let him also make mine."

Here then is this disposition of his property, most deliberately made and most firmly adhered to for five years, from 4th February 1820 to March 1825.—The Court here gathering his intentions from his own acts, and from these papers, all in his own handwriting, which speak much more decisively than mere depositions—can entertain no doubt what were his wishes; nor is there the slightest doubt that his faculties were unimpaired up to the end of January 1824. To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence.

William Dodge the nephew, brings forward a will, or rather three wills, one dated in June 1825; another on the 3d of July 1826; and a third on the 12th of July 1826—the instrument propounded. It is singular that between the third and twelfth of July the annuity to Elizabeth Martin is increased: this, if the paper was fraudulently obtained, may be accounted for, because legacies are often introduced for the purpose of colour. Now what is the substance of the instrument propounded by William Dodge? "It bequeaths the whole of his property to him in trust—to pay Elizabeth Martin, if living with the deceased at his death, an annuity of 40%: [under the paper of the 3d of July 1826 this annuity was 30%.] it gives to Benjamin Dodge, son of his late brother Benjamin:—to Robert Dodge, son of his late brother John:—to Joseph Lawrence, son of his late sister Elizabeth—100% each; these legacies to be paid at the end of a year from the testator's death, with a direction that if all or either of them should die before entitled to receive their respective legacies, such share or shares to form part of the residue; the will then provides for the payment of the deceased's debts, and appoints William Dodge sole executor and residuary legatee."—This is the substance of the will of the 12th of July 1826: it is technically drawn up; signed; sealed; and there are two subscribing witnesses—to whom I shall presently refer.

There are here, then, three legacies given to three nephews out of the great number the deceased had; and, as I have said before, some such might naturally be introduced if fraud had been resorted to: but the great bulk of the property is given to William Dodge, who had nothing under the repeated testamentary acts firmly adhered to for several years. This then is a will completely the reverse of his former disposition, wholly abandoning its principle, and therefore requiring clear proof of capacity and execution. It appears, and is admitted by Dodge's own evidence, that prior to the first of this second class of wills the deceased had resorted to the immoderate use of spirits and opium, the effect of which was to reduce him to a state of utter incapacity—whether he was encouraged to these excesses by Martin, or whether she could not re-

sist the deceased's determination to gratify this vicious taste, is not material at present.

Early in 1825, William Dodge, with the assistance of Gray, the medical attendant, and with the approbation of Fooks the confidential solicitor and executor of the former will, himself with force and violence removed the deceased (notwithstanding that he made all the resistance he could) from Marston to Sherborne, where William Dodge resided—and placed over him John Warr, who is described as a female nurse,—and, under his care, in about six weeks the deceased recovered. The removal to Sherborne took place in February 1825, and in June of the same year the deceased made a will: but it is admitted that at the latter end of that year there was a relapse, when a similar remedy was resorted to; and that in April or May 1826 he was a third time in the same condition, when Warr was again called in to superintend him, and continued in charge till the eighth of July 1826.

Here then are repeatedly states of incapacity: no matter by what name they are called—whether derangement—or being out of his senses; nor from what cause they spring: if, as it is asserted, from the ill-treatment, personal violence, or control of Elizabeth Martin, what does it prove but that he was in a state of incapacity and non-resistance? though the Court certainly is inclined to think that the charges against Martin are a little exaggerated. Here too are alleged intervals of capacity;—here is controul by William Dodge and persons authorized by him, he himself assisting in bringing the deceased to Sherborne;—here is the deceased, in a state of nervous excitement, going several times a day to Dodge's house—a very small quantity of liquor affecting his senses, and preventing his acting rationally and with judgment—yet wine is occasionally sent to his lodgings by Dodge and his wife in pretty liberal supplies:—here is a will, alleged to have been made during an interval of capacity, totally departing from the former disposition, and principally in favour of William Dodge;—under such circumstances, unless the Court is prepared to give up all the principles hitherto acted upon, it must demand the most decisive proof of the complete absence of influence and excitement at the preparation and making of this asserted will: It must require unimpeachable evidence of unbiassed volition and of clear capacity: It must expect to be shown instructions coming from the deceased himself, and an execution in the presence of witnesses above all exception. What then is the proof offered?

The will propounded is the last in date—that of the 12th of July 1826. For this will, it is admitted that there is no evidence of instructions coming from the deceased; but this is not all—the will is prepared, as is fully proved, by instructions and directions from William Dodge, the executor, the party agent, the party benefitted—it is executed, or rather the name of the deceased is got to it, without even reading it over to him: I am now assuming that it was signed by the deceased, but the only witness to that fact is the son of William Dodge, at that time a minor, who attests the will, and who is brought to depose that the deceased in his presence, and in the presence of his (deponent's) father and mother, subscribed the paper. This young man certainly has been placed in the most distressing situation. The other subscribed witness, Miller, did not see the paper signed, and consequently it was not attested by him—but this was his habit, for there is another instance of similar conduct on his part: he is a man who has been in the habit of

accepting bills of accommodation for William Dodge, who is indebted to him nearly 300*l.*; and is called in on two different occasions, and nominally attests what was not signed in his presence.(a) It is quite clear that no argument can sustain such a document, prepared and executed under such circumstances and supported by such evidence; the very transaction itself proves that the deceased was in a condition unfit to execute any will—he was in such a state of excitement that he would not wait a few minutes till the other witness arrived—and Warr, it must be remembered, had only ceased his attendance a few days. The proof then thus far is utterly insufficient to support this will.

It has, however, been argued that it is supported by collateral evidence arising from affection for William Dodge, and from declarations in his favour: and Burrow's evidence has been referred to—"that the deceased six or seven years ago [he was examined on the 9th of January 1828] used to speak very affectionately of his nephew William Dodge, and said, when he departed, he should leave him his property." Can that be true at that time? If that declaration was made then before the deceased's incapacity, it is contradicted by his former acts, and could only have been made in order to deceive and mislead: if after, what reliance can be placed on it? Besides, other declarations are opposed which are equally forcible, and neutralize the effect of this testimony of Burrow.

Again, here is evidence of the similitude of the deceased's handwriting: but supposing that all this species of evidence was on one side, and that the witnesses united in stating their belief that it was his handwriting, that would only prove it was not a forgery—it would not prove his capacity. There is, however, strong evidence of dissimilitude from persons speaking to their belief that it is not the deceased's handwriting. The banker's clerk says it is so unlike, that "had a cheque with such a signature been brought to him, he should have hesitated before he would have paid it." But I do not rely on this: assuming it to be his handwriting, there is not evidence to support it. Burrow's opinion only goes to prove that it is not a forgery;(b) and he speaks in such decided

(a) John Miller deposed:—"He and William Dodge have always been on intimate terms: they reside not more than 50 yards from each other. On the 12th of July, 1826, Joseph (William Dodge's son) came over to him about 4 o'clock in the afternoon, and said his father wished to see him: deponent went in about 20 minutes: Joseph Dodge showed him into the little parlour, where deponent found William Dodge and his wife: there was a paper, pen, ink, and a candlestick on the table: William Dodge told deponent 'he had sent for him to witness his uncle Joe's will—the old gentleman has been waiting for you some time, you know what a fidgetty man he is, he would not wait any longer and is gone; here is his will—he wants you to sign it, and a blank is left for your name.' Deponent then examined the signature, and asked Dodge and his wife, 'whether *that* was the deceased's handwriting:' they assured him that it was; and deponent being also acquainted with the deceased's subscription, had no doubt about it, and signed his name."—On the 18th interrogatory:—"Respondent about a twelvemonth (as he believes) before the last will, attested a will of the deceased: the deceased was not present on that occasion."

(b) Robert Burrow, of Sherborne, tailor, deposed: "that he knew the deceased for 14 or 15 years; that he often went to hear him preach; that upon an inspection of the names "Jos Dodge" set and subscribed to the will propounded by William Dodge, he has no doubt whatever that the same is the genuine handwriting and subscription of the deceased: deponent has frequently seen him write his name exactly in that manner.—Deponent saw the deceased during July and August preceding his death: on the 3rd of July, at the deceased's request, de-

terms of the deceased's faculties, that his evidence standing alone would induce a belief that the deceased never was incapable, though Warr was in attendance at the very time of which this witness is speaking.

If, however, abandoning the will of the 12th of July, Dodge reverts back to the will of the 3rd July, the proof is no better: Warr was also then in attendance;—if still further back, to the will of June 1825, there are the same defects or even greater: not only are there no instructions, but it is not even now disclosed in whose handwriting that paper is; and there again Miller attests without seeing the deceased sign. These two papers, then, are of no worth, nor validity—these two noughts added to the other nought will not make an arithmetical number.

There are various other particulars which throw a great cloud of suspicion over the whole transaction, to which I do not think it necessary to advert: it is quite sufficient for me to say that William Dodge has wholly failed in proving his case; and where, under such circumstances, a person will undertake to get a will prepared by his own agency, and have it attested by his own son, a minor, and by another who never saw it till after the signature was affixed; and will take upon himself, in suit, to prove it and therein fail, he must abide by the consequences.

Without, therefore, pronouncing that this will of July 1826, is a forgery (which perhaps it would not be proper for this Court to do); without pronouncing even that a fraud upon an incapable testator has been proved, though I confess that is my view of the case; yet I do think that I should not reach the justice of the case, and should very much shrink from a discharge of my public duty if I did not, in pronouncing against the will, condemn William Dodge in costs.

ponent witnessed his will; that a few days afterwards, deponent conversed with him; and on both of these occasions, deceased was of sound and disposing mind, and fully capable of giving instructions for and making and executing his will, or doing any act of that nature."

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**SCARTH v. The BISHOP of LONDON, his Vicar General, Surrogate, Registrar, or Actuary in Special, and all Others in General.—**  
p. 625.

The will of a party who died in Scotland, and all whose property, within the province of Canterbury, was in the diocese of London (some of it in the Funds) having been proved in the Consistory Court of London, and the Deputy-Registrar of that Court having appeared under protest to a monition to transmit such will, the Court will not overrule the protest; holding a Prerogative probate unnecessary, as the Archbishop and Bishop of London have by practice a concurrent jurisdiction in such cases: It will, however, in aid of justice, grant an additional probate, if required, limited to the property in the Funds.

In the Goods of JAMES TAYLOR.—p. 641.

*On Motion.*

Execution being only prevented by death, the Court will decree probate in common form on a proxy of consent from all *in esse* interested; but those not *in esse* will not be bound by the grant.

THE deceased died at Birmingham on the 19th of November, 1827: he left a widow—a son, and a daughter (Elizabeth wife of Henry Beaumont). His will, regularly executed, was dated in March, 1822. On the day preceding his death, while very ill, he sent for his solicitor, Mr. Ingleby, to alter his will; who immediately attended (in company with the deceased's surgeon) and drew up a codicil. When the codicil was prepared it was, at the testator's request, read over to him in the presence of witnesses, and he approved of it; but deferred signing it till the next morning, when he died without having executed it.

The son and daughter of the deceased and their respective issue were the only persons who could be prejudiced by the codicil: the son was since dead, unmarried and intestate: the daughter had no children.

Upon a special proxy of consent from the daughter and her husband, and from different legatees (whose interests were varied by the codicil) and a full affidavit of the facts,

*Lushington* moved for probate of the codicil in common form.

*Per Curiam.*

This is an ordinary case of prevention by death: there was no hesitation as to the contents; the execution only was postponed till the following morning. All at present in existence, who are interested, consent, and the issue that may be hereafter born will not be bound by this decree. Probate may therefore pass.

Motion granted.

In the Goods of ELIZABETH ROBINSON.—p. 643.

*On Motion.*

The Court will not grant probate, in common form, of a paper formally drawn up, but unexecuted, and which the deceased clearly intended to alter; nor of a subsequent paper in the deceased's handwriting, but undated, unsigned, and apparently unfinished, and with nothing to ascertain that it was written shortly before the death, or that it embodied the final intentions of the deceased; the deceased being an illegitimate spinster, and the Crown opposing the grant.

ELIZABETH ROBINSON, formerly of Tregunter, Brecon, but late of Sunbury, Middlesex, died suddenly on the 23d of May, 1828, a spinster and illegitimate, having personal property exceeding 4000*l.*; but no real estate.

Upon her death were found in a box containing her papers of importance, three papers of a testamentary nature; they were enclosed in an unsealed envelope, which was tied round.

Paper A was in the handwriting of the deceased: it was not signed,

nor dated, and did not dispose of the residue: but contained an appointment of executors.

Paper B was a will on parchment, prepared for execution. (a)

Paper C contained some memoranda in the handwriting of the deceased.

Upon affidavits from the deceased's solicitor, and from the medical attendant; *Lushington* moved for probate of paper A as the last will and testament of the deceased.

The *King's Advocate*, on the part of the Crown, opposed the motion.

*Per Curiam.*

The deceased, a spinster, and illegitimate, died on the 23d of May, 1828; and there are several documents of a testamentary nature before the Court: one of which, B, written on parchment, is ready prepared for execution; but in the concluding part are these words: "All the rest residue and remainder of my personal estate and effects subject to the payment of the last mentioned legacies and my funeral and testamentary expenses I purpose disposing of in such manner as shall be expressed in a codicil or codicils to this my will;" so that she intended to make an addition to the will even if she had executed it, but in fact she never did finish it. On the 5th of April she wrote to Mr. Powell, who prepared B: "I received the parchment agreeable to my desire and intend to fill it up and to make a few alterations but think to leave it for the present." She did not then merely suspend the execution, but she proposed to make some alteration. A, another of these papers, has nothing in it to show when it was written, except that it appears to have been subsequent to, because manifestly drawn up from, B. The water-mark, being 1824, affords no clue. It is in her own handwriting, but has no concluding words, no signature, no date, no distribution of the residue; and the affidavits only go to finding and handwriting, but do not fix the date nor contain anything to prove that the paper embodied her final intentions. It therefore is not entitled to probate unless with the express consent of the Crown. The parties interested may endeavour to convince the Crown that it was the deceased's intention that this paper should have effect, when some arrangement might probably be made for the payment of the legacies by the nominee of the Crown; but as far as this Court is concerned the present motion must be rejected.

Motion rejected.

(a) Mr. Powell, of Brecon, the deceased's solicitor, stated on affidavit that this paper was forwarded to the deceased on the 23d of February, 1825; and had been drawn up from her own verbal instructions: and that it had evidently been used as the model of paper A.

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## WOOD v. MEDLEY.—p. 645.

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### *On Petition.*

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Two papers having been propounded by an executor, in an allegation which was rejected, and administration thereupon taken out by the next of kin,—on a legatee under one of those papers calling in the administration, and the administrator appearing under protest; the protest allowed to stand over, in or-

der that the legatee, on showing he was not cognizant of the former proceedings, &c. &c. might bring in an allegation: the appointment of the executor being in one paper, the interest of the legatee entirely under the other, and the two papers not necessarily connected.

IN Michaelmas term 1827, an allegation—propounding, on behalf of the asserted executor, two papers as together containing the last will of John Medley—was rejected. (Vide *Cundy v. Medley*, *suprà*, p. 65.) Letters of administration then issued to Anne Medley, (a sister and one of the next of kin of the deceased) the party who now appeared under protest to a decree, served upon her at the promotion of Peter Wood, a nephew and a residuary legatee named in one of the aforesaid papers, in order that, on his behalf, the papers might be re-propounded. The averments, on either side, were set forth in an act on petition. (a)

*Lushington* and *Nicholl* in support of the protest.

Two points arise on this petition. First: Whether it is not true as a general rule, though possibly liable to exceptions, that when an executor has propounded a will, and no collusion is suggested, all persons claiming under that will are bound by his acts. Secondly: Whether, if this be the true rule, any reasons are here offered to take the present case out of such general rule.

In the first place the Court we apprehend, would be much disinclined to allow these proceedings to be revived, and the next of kin put to the fresh expense of opposing these papers a second time, unless it were bound so to do, either from a conviction that the rights of third parties had been improperly and lightly sacrificed in the former attempt to substantiate these papers; or unless it were required by the principles of law, or by a constant stream of authority. Now collusion is quite out of the question; for it is admitted that Mr. Cundy, the executor, fully discharged his duty; that he was assisted, and furnished with information by Riddel Wood, the brother of the present party, who has exactly

(a) In support of the act on Petition Peter Wood made an affidavit, dated on the 12th of May, as follows:—"Peter Wood, the younger, of the city of Antwerp, but now in London, maketh oath, that he is one of the residuary legatees named in the last will and testament (as contained in two paper writings) of John Medley the deceased; that he hath been informed and believes that the said John Medley died on or about the 12th of August 1827, and that soon after his death certain proceedings arose between J. W. Cundy the executor named in one of the said paper writings and Ann Medley and Priscilla Medley, two of the natural and lawful sisters and two of the next of kin of the deceased, with a view to establish the said papers as the last will of the deceased, the validity of which the said Ann and Priscilla Medley contested: And this deponent further saith that he was not informed of the said proceedings, as he was then labouring under a very severe and dangerous illness, until on or about the latter end of January or the beginning of February last past, when he was informed and believes that letters of administration of the effects of the said deceased had been granted to the said Ann Medley: he further saith that a short time since having been informed by his Agents in England that sufficient evidence hath now been obtained to establish the validity of the said paper writings, he did on the 22nd of February last instruct and authorize proceedings to be commenced on his behalf against the administratrix for the purpose of establishing the said paper writings as the true and original last will and testament of the deceased; and he further saith that he did not in any way consent or make himself a party to any acts done by James Riddel Wood, or John William Cundy, either during the dependance of the said proceedings or subsequent thereto, as he during the dependance of the same was wholly ignorant thereof."

the same interest; and that a *caveat*, entered into by the Proctor of that brother, was withdrawn by the advice of his Counsel; on the ground that the papers could not be supported. (a) This affords the strongest possible disproof of collusion or of neglect; and indeed, the Act on Petition abstains from suggesting any such charge.

That all parties and all interests are bound by the act of the *pars principalis* is a principle universally recognized. On this principle it is that, in cases of marriage, whether void or voidable, and in which the wife is the only party proceeded against, the decisions of this Court are held to bind the children. Indeed to what manifest inconvenience and injustice would any such practice as that now attempted, necessarily lead? When would a next of kin be safe, if allowed to be attacked by every legatee in succession? It may, however, be said, the objection is easily obviated by citing all parties interested to see proceedings: but if this were done, much useless expense would be incurred in every common suit; and it would render all property, where such a course had not been adopted, insecure. In *Colvin v. Fraser*, supra, p. 48, a doubt was raised whether the next of kin had a right to take out such a decree, and though the Court overruled the objection, it at the same time seemed to be of opinion, that the decree was unnecessary; as the legatees, unless collusion were shown, would be bound by the acts of the executor. The principle, that "*res inter alios acta aliis nec nocet nec prodest*" cannot be disputed; but this rule, we contend, is limited to the person having the chief and primary interest, and that those, whose claims are dependant upon, and deduced from, and through the *pars principalis*, are bound by his acts; that, after a sentence against the *legitimus contradictor*, none other has a right to contest the same question.

Who, then, is the *legitimus contradictor* of the will?—the *heres scriptus*—the executor—the person to whose especial care the testator, if testator he be, has committed the trust of carrying his will into effect—whom he has selected to watch over the interests of his minor legatees, and of his creditors, and, generally over his estate; and who is called the very foundation of a testament. Such is the rule adopted by the Courts of Common law, and of Chancery, by the Civil law, and by these Courts.

In the first place, it cannot be pretended that at Common law the act of the Executor does not bind the Legatees: he may confess as many judgments as he pleases, and they cannot even intervene, or, in any way, interfere to prevent him. In Chancery, though they may intervene, yet they are not—not even the residuary legatee—necessary parties to a decree against the executor. Hargrave's Law Tracts, pp. 475-6, *in notis*; *Lawson v. Barker*, 1 Bro. C. C. 303. *Brown v. Dowthwaite*, 1 Madd. 448. This doctrine is only gathered by inference from the Digests; (a) but the Commentators are express upon the subject. Scaccia,

(a) In the act on petition, and in the affidavit of James Riddel Wood, it was stated to be the opinion of Counsel, that "although the additional facts" [that James Riddel Wood had then discovered] "afforded strong grounds of presumption towards establishing the testamentary papers, yet that those facts as stated, or such at least of them as were supposed to be capable of proof, did not amount to what the Court would require."

(a) *Si hereditatis iudex contra heredem pronunciaverit non agentem causam, vel lusorie agentem: nihil hoc nocebit legatariis. Dig. lib. 30. tit. 50, s. 1. Again—Si ex causa de inofficiosi cognoverit iudex, et pronunciaverit contra testamentum,*

after stating as a general rule that "*sententia inter alios lata aliis non nocet*," gives the following among other exceptions, "*Quando sententia est lata cum legitimo contradictore, id est, cum eo cujus principaliter interest, et à quo alii jus habent consecutivum; quia tunc illa sententia facit jus quoad omnes, etiam non intervenientes et non citatos*." Again: "*Sententia lata contrà hæredem nocet fidei commissario etiam ignoranti litem et non citato*;" and, after stating that this doctrine is confirmed by many passages in the Digest, he concludes: "*ex quibus legum Doctores communiter videntur colligere quod sententia lata contrà hæredem, seu contrà testamentum, noceat etiam legatariis*." (a) Covarruvias is to the same effect. "*Ubi lis tractatur cum legitimo contradictore, à quo aliorum jus in eadem re derivatur et oritur; et qui primas obtinet in eâ controversiâ partes, sententia lata facit jus quoad omnes, etiamsi nec litigaverint, nec vocati fuerint ad judicium, nec scientiam litis controversæ habuerint*." (b) This principle is equally supported by Novarius; (c) by Heraldus; (d) by Peregrinus; (e) and by Mauritius. (f)

What is the practice here? A legatee is not allowed to propound a paper till he has cited the executor to propound, or to refuse so to do. This was decided in the case of *Da Silva v. Henriquez*. (g) Could then Mr. Cundy again propound this will? And if he could not be allowed, what a contradiction it would be to allow the person whose claim is subordinate to and deduced from his; and who is only allowed to propound on his refusal. There are no cases, that we are aware of, in which such a course has been permitted. The cases where the question has been raised by the next of kin against the executor, in possession of a probate, are completely distinct: the interest of all these are equal; none are secondary or subordinate; none are paramount;—there is no *legitimus contradictor*. And the practice of always citing the next of kin rests upon this ground, that no one next of kin represents another next of kin:

*nec fuerit provocatum, ipso jure rescissum est, et suus heres erit, secundum quem judicatum est: et bonorum possessor, si hoc contendit; et libertates ipso jure non valent, nec legata debentur; sed soluta repetuntur aut ab eo qui solvit, aut ab eo qui obtinuit.* Dig. 5. 2. 8. 16.

(a) Scaccia, in his "famous book," (as Mr. Hargrave in his *Law Tracts*, p. 483, calls it) *De sententiâ et de re judicatâ*, p. 349. gloss. 14. quæstio 12. n. 77. n. 78. (Ven. 1629. F.)

(b) Covarruvias *Pract. Quæst. c. 13. n. 5. p. 854.* and in another place, tom. 2. c. 13. n. 3.

(c) Novarii *Decisiones*, 29. n. 1, 2, 3. and *Decisiones*, 68. n. 10. p. 83. (1637. F.)

(d) Heraldus *de rerum judicatarum auctoritate*, pp. 20—1, (8vo. 1640.)

(e) Antonius Peregrinus *de fidei commissis*. Art. 53. n. 49. p. 1504, (4to. 1606.)

(f) "A writer of great authority on the civil law, in explaining where '*res inter alios acta*' shall bind third persons, says, '*suâ naturâ ac propriâ vi nocet vel prodest sententia aliis, quam inter quos lata est, quoties lis tractatur cum legitimo contradictore, à quo cæteri jus suum tanquam à fonte derivant ac recognoscunt*.' Erci Mauricii *Dissertatio de jure interventionis*. Vid. sect. 15." Harg. *Law Tracts*, p. 475.

(g) *Da Silva v. Henriquez*, 1793, *Prerog. East. Term.* 1 sess.

Caveat entered by next of kin. Legatee, named in a paper, declared he propounded it, and gave an allegation.

Dr. Swabey, counsel for the legatee, suggested that, as there were executors named in the papers, they ought to be cited to appear and propound. The Court (Sir William Wynne) agreed that the legatee ought to cite the Executors; and directed a decree to issue.

but to cite, regularly and formally, all the legatees under a will, who may be resident in different parts of the world, would be an impracticable attempt; and if it could be resorted to, much inconvenience would result from the number of parties that might thus be introduced into a cause.

The effect of a sentence of the Ecclesiastical Court was much discussed in the Duchess of Kingston's case; (a) and the result was, that all parties and interests are concluded by it, as much as if it were a sentence in a proceeding *in rem*; and it is established, that in a suit of salvage, or wages, parties, though not cited, are bound by the decree. (b)

In the case of *Lewis v. Bulkeley*, a similar application to the present was rejected by the High Court of Delegates. (c) It may be said, that, in that case, there was a regular sentence against a will. We admit the distinction; but how does it bear? That in a case where the question is so nicely balanced, that the Court allows it to go to proof, there the legatees are bound; but in a case so feeble in its circumstances, that the Court rejects the allegation, the legatees in succession may revive it, and vexatiously pursue the next of kin *ad infinitum*. So that the worse is the case of the parties, the better is their situation.

In respect to the second point—whether there is any thing to remove this case out of the general principle, and to support the present application—we submit that the affidavits are scanty, and quite insufficient to induce the Court to re-open the cause. The allegation was rejected without doubt or hesitation. On the part of Mr. Wood, there is much

(a) State Trials, Vol. xx. 8vo Edition.

(b) Attorney General v. Norstedt, 3 Price, 97.

(c) This was an appeal from two concurrent sentences of the Court at Bangor and of the Court of Arches, both which Courts had pronounced for the validity of the will of a married woman made previous to a second marriage.

The original citation at Bangor issued at the instance of Rowland Williams and Dorothy his wife, and also of William Lewis and Anne his wife—the next of kin of the deceased, calling upon William Bulkeley, tutor or guardian of his daughter Maria Bulkeley (during her minority,) executrix in the will of Maria Williams alias Hampton, to appear and prove the said will *per testes*; and further to do and receive what may be just.

There was no citation against the legatees, either personally or *viis et modis*, nor a citation against all persons in general to see proceedings.

On 17th February, 1732—3, the Delegates reversed both sentences. On 19th April, 1733, before the Con-delegates, *Hill* exhibited for Dorothy Williams, sister and next of kin of Mary Hampton, otherwise Williams, and prayed administration to pass the seal. *Sayer* exhibited a special proxy under the hand and seal of Owen Lewis, and alleged him to be a legatee in the will of the deceased in this cause, and now remaining in the registry of this Court.

Upon the petition of each Proctor, the act to be delivered three days before, and to show precedents on the last Court of this term.

On 7th May, the cause was assigned for information and sentence at Serjeants' Inn whensoever.

On 1st of June, before the whole commission at Serjeants' Inn. *Hill* prayed that administration of the goods of Mary Hampton, otherwise Williams, as dying intestate, be granted and ordered to pass under the seal of this Court to his client—the sister and next of kin of the deceased. *Sayer* prayed liberty to propound the will, in the name of his client, and to prove the same by sufficient witnesses.

The Judges, by their interlocutory decree, rejected the petition of *Sayer*, and ordered the administration to pass the seal in the name of Dorothy Williams—the sister and next of kin of the deceased.

*Note.*—This is the case cited as Mrs. Lewis' case. 4 Burn's Ecc. Law, p. 51.

appearance of vexation and delay. The names of the persons who inform him that the evidence, now in his possession, is sufficient, are not given; nor the names of the witnesses; nor the facts that can be established; nor when they came to his knowledge. The party should have been ready with an admissible allegation; or at least the Court will require, before it over-rules this protest, that such facts be laid before it, as, if pleaded, would constitute an admissible allegation. *Dabbs v. Chisman*. *Jennens v. Beauchamp*, 1 Phill. 158.

*Phillimore and Addams contra.*

The general principle we may admit to be correctly stated. If, for instance, a will had been *bona fide* opposed by the next of kin on the ground of fraud, insanity, collusion, or force, and established, the Court, after an interval of many years, during which the sentence had been acquiesced in, would not be inclined to re-open the proceedings; but great hardships would result, if, in all cases, this course were pursued. One example will show it. Suppose a party, unadvisedly, propounds papers, and the allegation is rejected; could such a proceeding be conclusive against all persons interested under those papers? We admit that, under the circumstances, the allegation offered by Mr. Cundy, was properly rejected; but we contend that, with reference to the facts disclosed in our affidavits, and to the character of the deceased, the arguments adduced against this application are, in a great measure, irrelevant and insufficient. The two papers are not necessarily connected: the principal one has no executor named in it. Is then a person, so much interested as Mr. Peter Wood, to be bound and precluded by what has already passed in respect to these papers? It has been argued, as a broad proposition, that under no circumstances (unless fraud or collusion be shown) where an executor has propounded a will, can another party come in, and revive the proceedings? and it may be generally true, that *his pendens* is a notice to all parties interested; yet the doctrine of this Court has never been that, in every possible case, a party is bound by the acts of an asserted executor. What is said in the Civil law as to the *pars principalis* strongly favours our case; for, by the Civil law, the *pars principalis* means the heir, who answers to our next of kin. In the Court of Chancery it is true that an executor represents all parties, because it has been previously decided here who is to represent the testator. There is no analogy whatever between matrimonial and testamentary causes. *Sententia contra matrimonium nunquam transit in rem judicatam* is well established as a general principle; and there are instances where, to a certain degree, a sentence in a matrimonial suit may be again put in issue.

*Per Curiam.*

In the case of a voidable marriage, where the parties are dead, could the question be agitated incidentally by children? I am not aware of any case where that has been allowed.

*Argument resumed.*

In *Newell and King v. Weeks*, 2 Phill. 224, the principle upon which we rest this application was acted upon by the Court; and the same doctrine has been maintained in *Jennens v. Beauchamp*, 1 Phill. 158; *Braham v. Burchell*, 3 Add. 243; and a variety of adjudged cases. No precedent has been brought forward that will support the argument on the other side. *Lewis v. Bulkeley* is easily distinguishable; for, in that case, there was a regular sentence after the pleas had gone to proof. The

question then is reduced to the circumstances; for it is admitted that the general rule is open to exception. We contend that Mr. Peter Wood was not cognizant of the former proceedings, and that enough is established not to preclude him from being allowed to plead his interest.

*Per Curiam.* Is he a party in distribution?

*Argument resumed.*

Yes, he is. If, however, the Court should prefer that this matter, as to the protest and bringing in of the administration, should be suspended till an allegation is offered, and the Court has an opportunity of judging whether it is admissible, we see no objection to the adoption of that course.

JUDGMENT.

SIR JOHN NICHOLL.

A person of the name of John Medley died on the 12th of August 1827, having left three sisters, and several nephews and nieces, entitled in distribution. After his death two papers, described as together containing his will, were propounded by Mr. John Cundy, the asserted executor: they were opposed; and, an allegation given in support of them having been rejected by the court, (a) administration was decreed to two of the deceased's sisters. The administration, after some delay occasioned by a caveat having been entered by one of the nephews, James Riddel Wood, seems to have passed the seal to one of the two sisters on the 28th of January; and is now called in by a process dated on the 20th of March, and taken out by Peter Wood, another nephew, and a residuary legatee, under one of the papers. An appearance has been given thereto under protest, which, having been extended into an act of Court, refers to a variety of opinions, given by Counsel of this bar, respecting the validity of these papers, and also enters into a statement of certain facts and occurrences, from which, on the one hand, it is contended that Peter Wood ought not to be allowed again to propound these papers, and, on the other, that nothing has happened to debar him from that right. Though the opinions given on either side concur that the papers are of no validity, yet, as Peter Wood has not been proved to have consented to be bound by those opinions, and, as they cannot therefore be decisive of the present question, I shall not further notice them.

The question then is, whether Peter Wood, either as a matter of right or of equitable indulgence, ought to be permitted to set up the validity of these papers. In the first place, two papers are propounded, and if it were quite clear that Cundy was nominated executor of that under which Peter Wood claims, the Court would be justified in holding that, as appointee of the deceased, Cundy's act (unless collusion, of which there is not a shadow of suspicion, could be shown) would bind all persons interested under the asserted will: because, the executor is not to be considered merely as the *pars principalis*, or *legitimus contradic-tor*, but as the person especially selected by the deceased to carry his wishes into effect. But how does the fact stand on reference to the instruments themselves? [The Court here described the papers. Vide *supra*, p. 65, and then continued:]

Now Peter Wood's claim is wholly under the first instrument, and the appointment of Cundy is made in the second scrap of paper; and it appears from both, that the deceased clearly intended to appoint more

(a) Cundy v. Medley, *supra*, p. 65.

executors than one. That this second paper has any reference to or connection with the first, *non constat*; and unless that connexion is established, Mr. Cundy would not be the *legitimus contradictor*; for he would not be the executor of the former paper, under which alone, as I have said, Wood is interested. True it is that the decree extracted by Peter Wood calls on the administratrix to show cause why Mr. Cundy should not be assigned to take out probate as executor; but that is the mere form in which he has been recommended to extract the process, and it may still be established that Mr. Cundy is not the executor. Mr. James Riddel Wood, who furnished information, and was consulted respecting the former suit, and was cognizant of, and privy to, every part of those proceedings, would unquestionably be bound by what then occurred: but the question with respect to Peter Wood is, whether he was legally, or *de facto*, privy to the suit between Cundy and the Misses Medley. Not legally, because though one of the opinions recommended that a citation against all persons interested under the papers should be taken out, that course was not pursued; but the parties thought to go a shorter way to work. It remains then for him to show that he was not *de facto* privy. If the intervention has not taken place at the earliest period, I should hold the party bound by the *lis pendens*; and as there was no reason why he should have intervened, his father and brother being both on the spot, I should not consider his bare non-intervention and non-citation sufficient grounds to justify the Court in permitting him to re-propound these papers, unless he can also show that he was *de facto* and *bona fide* ignorant that there was a suit depending. He does not state when he was informed of the actual *lis pendens*. There is, in his affidavit, much room for mental reservation. The Court does not actually arrive at what is his meaning—he does not state that he did not know, at the time, of his uncle's death—he does not state when, nor under what circumstances, information of the facts on which he now relies reached him, nor who are the agents from whom he received that information, nor what the facts are, so that the Court might judge for itself, nor does he even state, that they have been laid before Counsel as all the other facts have been: he says, “that he did not in any way consent, or make himself a party to any acts done by James Riddel Wood or John William Cundy, either during the dependence of the said proceedings, or subsequent thereto,” but I rather collect from some other parts of the affidavits, that he was aware of the proceedings. Now if it is quite clear that Peter Wood did know there was a suit pending, and chose to trust the protection of his interest to his father, to his brother, or to any other friend or adviser, he would be in strictness perhaps bound; still as the Court in its discretion exercises a degree of indulgence towards parties out of the kingdom, and as what appears is not sufficient quite to convince me that he knew what was going forward, I do not feel imperatively called upon to uphold the protest without allowing a further opportunity of establishing his claim to the equitable consideration of the Court. I shall therefore allow the protest to stand over for the present, and adopting in some measure a suggestion of the learned Counsel who spoke last, shall permit Peter Wood to bring in an allegation; on his making an affidavit, showing that he was ignorant of, and abroad during the pendency of, the former proceedings, and stating the time when the facts relied on to substantiate the validity of these papers, first came to his knowledge: but he must understand that he does this

at the certain peril of the full costs of calling in the administration, if he should ultimately fail in proving these papers entitled to probate.

The allegation might, and perhaps, indeed, ought to have been brought in this day; but I direct it to be brought in on the next Court day. Perhaps, too, if Peter Wood had not been a party in distribution, the Court would have required from him a security for costs.

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*On Admission of the Allegation.*

An executor having propounded papers in an allegation which was rejected, and administration being thereupon decreed to the next of kin; a legatee cannot be allowed to call in such administration, in order to repropound the same papers, unless he can bring in an admissible allegation, and show by affidavit that the facts have come to his knowledge since the rejection of the former allegation: in which case *semble* that even the executor might repropound them.

An allegation repropounding two unfinished papers rejected, the facts not being sufficient to rebut the adverse presumption of law: and the administrator who appeared under protest dismissed with costs.

When an instrument is unfinished, its state must be accounted for; either by showing completion prevented, or that the deceased, abandoning his intention of finishing it, meant it to operate in that form without any further act.

This allegation was, in substance, as follows:

1. "That John Medley died on the 12th of August 1827, a bachelor; leaving Ann and Priscilla Medley, spinsters, and also Susanna—wife of John Frost—his sisters and only next of kin; and together with several nephews and nieces, children of two deceased sisters—Mary, wife of Benjamin Jefford; and Elizabeth, wife of Peter Wood, the only persons entitled in distribution to his personal estate and effects, in case he had died intestate. That the deceased left no real property, and that his personal estate and effects consisted of 17,000*l.* in the Funds."

2. "That he was a person of very eccentric and retired habits; extremely penurious and reserved in respect to his affairs, and kept up very little intercourse with any of his relatives; that during the latter years of his life he resided entirely either at taverns or lodgings; and, when at the latter, he took his meals almost daily at some neighbouring tavern."

3. "That he for many years previous and up to the time of his death allowed to his sisters, Ann and Priscilla Medley the yearly sum of 80*l.* each; that he frequently expressed his intention of leaving them annuities for life only (they being elderly unmarried ladies) and that such his intentions were at all times known to the said two sisters, who were and expressed themselves to be perfectly satisfied therewith."

4. "That for many years and till his death the deceased entertained a very unfavourable opinion of the conduct of John Frost, the husband of his sister Susanna, in consequence of his extravagant habits; and the deceased frequently declared that the said John Frost should not have the spending of any of his property."

5. "That the deceased at all times had a great affection for his nephews and nieces (Jefford and Wood); and frequently declared to divers persons that they would eventually come in for all his property, but not in equal proportions, as he intended to make a distinction in that respect

in favour of one or two of them, without however, at such time, specifying which one or two in particular."

6. "That in October 1824 the deceased wrote No. 1.; and that not having named any executor thereof, he did some time afterwards, but when more particularly the party proponent is unable to set forth, with his own hand draw up No. 2. That the said paper writings contain together the last will and testament of the deceased, and were meant and intended by him to operate as and for his last will and testament. And that by such last mentioned paper he appointed John William Cundy sole executor of his will."

7. "This article pleaded the handwriting of the testamentary papers."

8. "That the deceased employed Capel, Cuertons and Cundy as his Stockbrokers; that he placed great confidence in them, (particularly in J. W. Cundy, his executor); and that he frequently deposited large sums of money in their hands which they held as his bankers."

9. "That on the 10th of September 1823 the deceased took up his residence at the Princess Charlotte Tavern, at which he wholly lived until July 1825, when he quitted in consequence of its then proprietor retiring from the house. That during such his residence the deceased became much attached to, and took into his confidence, George Caines the principal waiter in the tavern, and frequently expressed himself as extremely thankful to Caines for his kindness and attention, especially during several serious attacks of illness. That in August 1826 the deceased, then resident in Arundel Street, having accidentally met Caines, proposed he should enter into his service in order constantly to attend upon him and accompany him in his walks; which Caines did, but shortly quitted the service from a want of suitable accommodation."

10. "That in the latter end of 1824, and whilst the deceased was living at the Princess Charlotte, he being very unwell, requested Caines (as he had frequently done on former similar occasions) to come and sit with him after the business of the house was over, which Caines did, and remained talking with the deceased for a considerable time. That the deceased who, on such occasions, was and complained of being unusually ill, stated expressly to Caines, 'that happen what would to him, or die when he might, he had made his will, or settled his affairs, and that his mind was quite easy in that respect.'"

11. "That in the beginning of June 1825 he informed Caines it was his intention to go for a short time into the country, as he found his health still declining; and at the same time assured him, that 'in the event of any thing happening to him, (the deceased) his will was made, and his affairs finally settled.'"

12. "That he for many years previous to his death, was on terms of the greatest intimacy and confidence with — Edwards Esquire; that during the last two years of his life they met almost daily and dined together at the Constitution Tavern. That, on very many of those occasions, he informed — Edwards 'that he had made his will, and thereby eventually bequeathed all his property to his nephews and nieces, but that one or two of them would take more than the rest.'"

13. "That in the latter end of May 1827 the deceased was suddenly taken ill and deprived of his mental faculties; and that in consequence of such illness the said Ann and Priscilla Medley came to London; that, whilst at the deceased's lodgings, they wrote to Mr. Henry Edwards, a Solicitor, and acquaintance, to request he would immediately come to

them for the purpose of preparing a power of attorney to be executed by the deceased for receiving his dividends at the Bank. That Henry Edwards accordingly attended at the deceased's lodgings; and that on such occasion Ann and Priscilla Medley brought down, from the deceased's desk, the paper-writings, No. 1 and 2, pleaded as aforesaid, and requested him to inform them, 'whether it was a legal instrument?' That he replied, 'they were imperfectly executed, and recommended that a more formal instrument should be prepared.' That Ann and Priscilla Medley well knew the contents of the said papers, and expressed themselves satisfied that such were conformable to the wishes of the deceased; and, at the same time informed Henry Edwards that should the deceased be restored to a proper state of mind they would urge or recommend him formally to execute the same, or to make such or a similar will. That Henry Edwards again saw the said paper-writings on the following day; and that, on both occasions, they were pinned together. That the deceased continued, until his death, in a state both of body and mind which totally disqualified him from attending to, or comprehending his affairs."

14. "That the said papers, when taken possession of by Ann and Priscilla Medley, were discovered in a pocket-book in the deceased's writing-desk, wherein all his papers of value and his securities were deposited: that the pocket-book contained two receipts signed by the deceased's sister Susanna (now Frost) the one dated 16th December 1817—the day previous to her marriage—for 487*l.* 10*s.*: and the other for 25*l.* Also an acknowledgment from James Wood, a nephew, of the gift of 800*l.*, subject to a 5 per cent. interest during the deceased's lifetime, bearing date the 7th of May 1827.

*Lushington* and *Nicholl* in objection.

The party still persists in propounding No. 2, and probate is prayed to Cundy exactly as before: but the only ground of allowing this cause to be revived, was the disconnexion of the two papers; yet, throughout this allegation, recognitions, custody, finding, are pleaded as applicable to both: all facts support the latter as well as the former. The expressions of intention go no further than the papers themselves; and it has already been decided that the papers show only a passing intention, *à fortiori* then, declarations, which are much weaker, inasmuch as they may be more easily misunderstood, and more easily made. The affidavit is unsatisfactory. Wood does not state that he was abroad, which was required to be set forth. He says that the proceedings were instituted and conducted without his knowledge, but he does not say that he was ignorant of the pendency of the suit. It is perfectly consistent with the affidavit that he knew there was a suit, though he might not be aware of the parties to such suit, nor of the particular steps that were taken in it.

[The objections taken to the substance of the allegation were those referred to in the judgment of the Court.]

*Phillimore* and *Addams* contra.

The paper is certainly imperfect, but what is the doctrine of the Court in cases of this description?—that the degree of proof must be in proportion to the imperfection of the instrument: it may, therefore, be more or less difficult of proof according to the circumstances. This paper is capable of being sustained by extrinsic evidence—by the answers of the adverse party, and by the testimony of the witnesses who are vouched to establish the allegation. It is, in itself, more than a mere

inception of a will; it disposes of the residue; and the heading of it—"This is the last will and testament of me John Medley"—is very generally considered and adopted as tantamount to a signature; Burn, in his Ecclesiastical Law, and Blackstone furnish authorities to that effect; [see 4 Burn's Ecc. Law, p. 77., Tyrwhitt's edition, and the cases there cited: and 2 Black. Com. p. 376, Coleridge's edition;] and it is so laid down in respect to real property, *a fortiori* it may easily be regarded as sufficient in a case of personalty only; and here there can be no doubt as to the fixed and final intentions of the testator. The character of the deceased was eccentric, and that may account for his having written his will on a passport. The affidavit has been objected to as not sufficient; it might easily have been drawn more specifically, and, no doubt, it would have been fully borne out by the facts.

## JUDGMENT.

SIR JOHN NICHOLL.

I am not clear that the Court ought to consider this allegation at all; for it appears that the papers, which are now brought forward, have been before propounded by Mr. Cundy, who then was, and still is, alleged to be the executor. Generally speaking, a legatee is bound by the act of the executor, and perhaps in the present instance, Mr. Wood might more especially be held bound, because in the former proceedings Mr. Cundy was assisted by another legatee—the brother of the present party. Thus the executor, who *primâ facie* is to be considered the *pars principalis* or *legitimus contradictor*, having failed in his endeavours to establish these papers, another legatee could not be allowed to assert their validity a second time except on some special grounds: I say "except on some special grounds," because I do not mean to assert that an executor even, after having once propounded a paper, and been unsuccessful in showing its title to probate, would in all possible cases be barred from re-propounding it, on proof, that since its former rejection, material facts had come to his knowledge.

The express condition then (as it also was the principal ground) on which the Court permitted, in this case, an allegation to be offered before it decided on the protest, was—that it should be accompanied by an affidavit that the facts were newly discovered, and that the party believed he should be able to make due proof of them.

The affidavit brought in however is extremely slight and loose, and does not at all satisfy the exigency of the case: but, passing over this preliminary objection, it would, perhaps, be more satisfactory to the party if I proceeded to consider the allegation. In so doing the Court can have but little doubt as to its decision, more particularly as it must bear in mind that the application, being special, the facts to support it must be special also.

The averments do not in substance, differ very widely from those contained in the original allegation. The only additional circumstances which could possibly be esteemed material, or have any weight, are certain declarations made to a waiter and to a tavern friend. The first eight articles—besides stating the number of the deceased's relations, the amount of his property, his habits, his mode of life, and the making and handwriting of these papers—plead the state of his affections, and regard for the different parts of his family; all which were to be inferred from, and do not go beyond, the papers themselves, and must, I presume, have been known when the former allegation was given in: if indeed they

have come to the party's knowledge since, he was bound, under the circumstances in which they are offered, to have specified the time and place at which he became first apprised of them.

The paper itself does prove what his testamentary intentions were at the time it was written, and is evidence of the disposition then contemplated: it is, as has been observed, fairly written and contains a full disposition of his property, but it is not without some erasures, and there is a blank for the amount of his annual income, which it is a little singular he should not have ascertained, if he had finally determined that this disposition should take effect. It is, however, pretty fairly written, but it is not subscribed: it is said—*that* is not necessary; and, for some purposes, that may be so: but where there is no subscription there is the absence of one of the strongest proofs that the paper is finished, and that is the reason why the circumstance always has effect in this Court. The paper upon its face is not a will, but a writing preparatory to a will—a draft to be copied: it is written on the back of a passport—whether new or old is of little importance, but it does certainly appear rather of a fair colour. It is hardly credible—at all events it is highly improbable—that a man, however eccentric or however penurious, would choose such a material of which to form the very instrument that he intended to operate: the presumption would be strong against it even if more finished. It must be considered as a preparatory draft: it is manifestly imperfect: it concludes “I appoint my executors” and none are appointed: this is most decisive that he intended to do more—that he proposed to name more than one executor.

Here is another paper—a little scrap: supposing it to have been pinned to the first, what does it show, but that he intended to appoint executors, of whom Mr. Cundy was to be one: who the other was to be, the deceased was still deliberating; he might even be undecided about Mr. Cundy, for it does not appear that he ever spoke to that gentleman on the subject. I cannot consider that this was any recognition of the first paper, amounting to proof of his having finally made up his mind. The papers then are clearly upon the face of them unfinished, and not only unfinished, but are merely preparatory to some other instrument.

The rule of the Court, which is clearly established, and which I think ought to be most carefully followed, is, that where an instrument is unfinished, you must account for its state, either by showing that the deceased was prevented from completing, or by showing that he had abandoned the intention of finishing it, meaning that it should operate in that very form, without any further act.

The paper No. 1. is dated two years and a half before the deceased's death: it is quite obvious, therefore, that he was not prevented from finishing it; he might at any day or hour during these two years and a half have appointed executors, have signed it, and, if he wished, have had it attested. That he was prevented from so doing, however, is not the case set up: but it comes to the other point, that he did not mean to appoint executors, except as by paper No. 2. but intended the instruments to operate in their present form. Now that they were found in his pocket-book, in conjunction with other papers, some bearing date as far back as 1817,—some as recently as May 1827, in no way accounts for his not intending to give them a more formal and complete effect, nor affords any ground to believe that he wished, meant, or considered them to be operative, and to take effect as his final will. This is so

contradictory to the papers themselves, and so highly improbable, notwithstanding his eccentricity, that nothing short of the most positive and direct circumstances would be sufficient to establish that such was his intention.

These declarations, that he had made his will, would be utterly insufficient and extremely unsafe grounds on which to proceed. Declarations at all times, unless coupled with acts, are very loose and dangerous evidence—are liable to be insincere—liable to be misapprehended—liable to be misrepresented: but in this case, as has been observed, these declarations do not apply, and have no direct reference to this instrument in particular. If this paper had been produced to his friends and he had said, he did not intend to appoint executors, and wished this instrument in its present form to operate, the case would have borne a different aspect; but the declarations pleaded might as well apply to some other instrument which the deceased may afterwards have thought proper to destroy. The first declaration, as pleaded in the tenth article of the allegation, was made about the time of writing the paper,—that is—three or four years ago: and on this the Court is asked to believe that the deceased had finally settled his affairs. The other, in the eleventh article, is pretty much to the same effect. The remaining declarations are those made to a person of the name of Edwards, of whom Mr. Wood is able in this allegation, to set forth neither the christian name, nor residence. This declaration does bear a reference more connected with the substance of this paper, but it does not identify it, for it is probable enough that if he had made a will, it would be something of this effect: but it would be unsafe in the extreme to the rights of property, and to the interests of the next of kin if upon these general declarations, not applying to a particular instrument, and made to a waiter or tavern acquaintance, the presumptions of law relating to an instrument so manifestly unfinished, could be repelled.

The other circumstance, the impressions of the sisters at the finding, does not supply the defects. Even supposing the affidavit to have been completely satisfactory, that the facts were *noviter perventa*, or, putting the case still more favourably, supposing the circumstances had been laid in an allegation tendered immediately after the deceased's death—still this plea would not compose a case sufficient to sustain the instrument propounded; and I am still of opinion that the deceased is dead intestate.

I therefore reject the allegation and allow the protest.

*Lushington* prayed that Mr. Wood might be condemned in costs.  
*Per Curiam.*

I can see no reason why—after the executor had been before the Court, and the other brother also had been watching the proceedings—the administration which had gone out should have been called in. No affidavit of stringency has been laid before the Court to justify the proceedings. If the case had been brought forward at first, the expenses of it would, as in the original cause, have been allowed out of the estate. I do not think that I can, consistently with what is due to the rights of those in possession of an administration, now refuse to condemn Mr. Wood in costs; but I leave it to the discretion of the other parties to decide whether they think fit to press for them.

Allegation rejected with costs.

## DRAPER v. HITCH and Others.—p. 674.

A married woman having under a certain settlement and also under her mother's codicil, made a will: and, under her mother's codicil specifically and under "all and every other power," &c. &c. generally, made a second will with a general revocatory clause; the Court of Probate will grant a general administration with the latter will annexed, but not pronounce against the former will; leaving it to the Court of Construction to decide whether the former will is thereby revoked.

In the Court of Probate an ambiguity on the face of a paper as to the *factum*: e. g. whether a revocatory clause was intended to operate as a general or only as a partial revocation, lets in parol evidence.

In order to the admission of parol evidence in a Court of Probate, to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be on the face of the paper; and the facts to be proved must completely remove that ambiguity.

THIS was a cause (promoted by Carter Draper, an executor in a will dated the 9th of April 1824) of bringing into and leaving in the registry of the Prerogative Court, certain letters of administration (with the will, dated the 19th of October, 1824, annexed) of the effects of Ann Branen (wife of George Branen) deceased, heretofore granted, (with the husband's consent) by the authority of this Court, to Elizabeth Hitch, spinster, the sole executrix; and of showing cause why the administration should not be revoked, and probate granted to her, limited only to the estate and effects of which the deceased had power to dispose by virtue of her mother's, Ann Jordis's second codicil, (and which she had by her said will disposed of accordingly) or under such limitations as the Court might appoint; and of proving in solemn form of law the will bearing date the 9th of April 1824.

On the part of Draper, an allegation consisting of seven articles was given in. The first pleaded in substance as follows:—

1. That Ann Branen died on the 30th of August, 1825, without issue, leaving her husband; Elizabeth Lee, spinster, her sister, and Mary—(wife of George Wilson)—formerly Freeman, her niece—the only persons who would have been entitled to her personal estate in case she had died intestate and unmarried.

2. That by a settlement, dated the 20th of October 1817, made between Ann Jordis, widow; her daughter, Ann Branen (the deceased); and divers trustees, it was witnessed that certain stock should be held in trust for Mrs. Branen, during her life, for her separate use independent of her husband: and from and after her decease upon further trust for her issue, but if no issue, then subject to her appointment by will for any person other than her husband; and in default of such appointment, or of a complete disposition of the trust money, then as to such part thereof, to which such direction, limitation or appointment should not extend, upon trust for the next of kin, who should be then living, of Ann Jordis; to be divided between them according to the statutes of distribution.

3. That Ann Jordis duly executed her will with two codicils; and by the second codicil dated the 24th of December, 1817, after reciting a certain disposition of her property under her will, revoked the bequest, and directed in case Mrs. Branen died without issue, that the same should be subject, but in exclusion of her husband, to her appointment by will, notwithstanding coverture. This article further pleaded the death of Ann Jordis in the lifetime of her daughter, without having al-

execute the will when it was ready. At the execution, the clerk says: he read the whole contents of the will over to Mrs. Branen, including the clause of revocation, and that no observation was made upon it;" and on an interrogatory he states: "that nothing passed to lead him to believe, either previous to the execution, or in allusion to the will, dated the 19th of October, 1824, that it was, at that time, the intention of the testatrix to make a will limited in its operation to part only of the property over which she had a disposing power; but on the contrary, he firmly believes that she fully intended it to be her last and only will, and to operate over all her property."

How can this Court say that here is such an ambiguity, as will authorize it to set aside the revocatory clause? It is bound to confirm the general grant. What may be the decision of other Courts, to which the construction of the due execution of such powers properly belongs, I cannot undertake to say. It will appear upon the face of the papers that the revocatory instrument does not specifically refer to the power under which the former will was made.(a) On the effect of that circumstance I do not decide. This Court will be governed by the ordinary principles of testamentary law and the manifest intention of the testator, in the absence of any clear authority establishing a different rule applicable to this case.

I therefore direct the general administration with the latter will annexed to be delivered out, but I do not pronounce against the former will.

(a) By the former will, viz. that of the 9th of April, 1824, Mrs. Branen disposed of the property under the settlement, as well as under her mother's codicil; but the will only recited generally—"Whereas I am enabled, notwithstanding my coverture, to dispose of my property by will I do hereby," &c. For the revocatory clause in the will of October, 1824, see *ante*, p. 290, note(a).

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In the Goods of SARAH BLAKELOCK.—p. 682.

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*On Motion.*

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The executors having died in the deceased's lifetime, a joint limited administration, with the will of a married woman under a power annexed, granted to five residuary legatees, to whom a similar grant had been made at York, the *forum domicilii*, and who were all parties to a suit in Chancery.

SARAH BLAKELOCK, late of Chapel Allerton in the parish of Leeds, by virtue of her marriage settlement made her will, and thereof appointed her husband and John Charlesworth executors: she also appointed five residuary legatees.

The *King's Advocate*, after stating that the executors died in the lifetime of the deceased, and the five residuary legatees had been admitted joint administrators, with the will annexed, by the Court at York, the *forum domicilii* of the deceased, and were parties to a suit in Chancery, moved, under the circumstances, for a limited administration to the same parties, though it was contrary to the ordinary practice of the Prerogative Court of Canterbury to join more than three in an Administration.

Motion granted.

LOTON v. LOTON.—p. 683.

A Diocesan administration obtained by one next of kin, directed to be brought in, and pronounced null and void on the prayer of another next of kin who had taken out a Prerogative administration: the Diocesan administrator being personally cited and showing no cause to the contrary.

PEDDLE v. EVANS.—p. 684.

The Court will not direct the Deputy-Registrar to allow the solicitor of a party, who has a new proctor, to be present at the examination, by consent, of the bill of costs of his former proctor: such an attendance being unusual and unnecessary to the purposes of justice.

Bills of costs between a proctor and his party are of Common Law cognizance; the Ecclesiastical Court has no jurisdiction over them—the examination of such bills by the Deputy-Registrar is only by consent and *ex gratia*; and neither party is thereby bound as to the amount.

The Ecclesiastical Court can enforce the payment of costs, where one party is condemned in costs, to the other party; and such costs are then taxed by the Judge, in open Court, on the report of the Deputy-Registrar, subject to objection from either party.

When a party regularly complains of gross extortion by his Proctor, the Court may punish the Proctor by suspension or otherwise.

Where affidavits contain irrelevant matter, the Court will not allow them to be read, but what is relevant may be taken as read.

The Court will not hear, on an *ex parte* motion and on affidavits, a case where offences are charged and punishment prayed.

In the Goods of MARY KEANE.—p. 692.

*On Motion.*

Administration granted to the nephew on the renunciation of his father,—the brother and sole next of kin of the deceased.

VALLANCE v. VALLANCE and Others.—p. 693.

*On Motion.*

The original will being lost and no copy in existence, a limited administration with the will (contained in an affidavit) annexed, granted to the widow, as executrix and residuary legatee for life on her giving justifying security: the eldest son having been personally cited; two other children, minors and abroad, cited by a service on the Royal Exchange, and the remaining five consenting.

WILLIAM VALLANCE, late of Bermondsey, Surrey, died in October, 1814; he left a widow and eight children, the only persons entitled in distribution in case of his intestacy.

In the beginning of October, 1814, the deceased—in the presence and hearing of his wife; of one of his four younger children; and of two other persons—dictated his last will to his medical attendant, who im-

mediately committed the same to writing, and then read it over to the deceased, when it was duly executed.

By this will, after bequeathing a suit of mourning to his eldest son, he left the residue of his estate and effects to his widow for life, and upon her death, in equal proportions, to his four younger children. He appointed his widow and John Hosier executors.

Upon the death of the testator his widow delivered the will to Mr. Hosier; but, in his life-time, on account of the embarrassed state of the deceased's affairs, no steps were taken to prove it. Mrs. Vallance was now anxious to take probate; she had recently been informed that the sum of 112*l.*, to which her late husband was entitled, might be recovered; and had applied to the solicitor of the representative of the late Mr. Hosier for the will; but it could not be found; there was no copy in existence; and the attesting witnesses were dead.

Upon an affidavit of these circumstances, a decree with intimation had issued against the children, to show cause why probate of the substance of this will, as contained in the affidavit, should not be granted, under the usual limitations, to the lawful relict and executrix. This decree was personally served on the eldest son; it was also affixed to the Royal Exchange, as two of the children were minors and abroad.

A proxy of consent had been signed by all the children in England, except the eldest son; and *Phillimore* now moved that probate should pass according to the decree.

*Per Curiam.*

It would be dangerous to decree this probate merely on the affidavit of interested parties without requiring security;—but the Court sees no objection to the grant of an administration with the will, as contained in the affidavit, annexed, limited until the original is produced; provided the widow gives justifying security.

Limited administration decreed.

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In the Goods of JAMES THOMAS.—p. 695.

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*On Motion.*

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In order to the grant of probate, in common form, of an unfinished paper, there must be, first, affidavits stating such a case as if proved by depositions would establish the paper, and secondly, consent, implied or express, from all parties interested.

JAMES THOMAS died on the 13th of January, 1828; and left a widow and seven children. By a testamentary paper he appointed his wife universal legatee—sole executrix—and guardian of his children during their minorities. He left no real estate; and the personal property did not exceed 160*l.* Of this instrument, as the last will of the deceased, *Pickard* moved for probate.

*Per Curiam.*

This paper, in the deceased's own handwriting, giving every thing to the wife, is written on a small octavo half-sheet; and begins in a formal manner—"This is the last will and testament of me James Thomas of Topsham:" it is signed, has an attestation clause, but no subscribing witnesses; and the paper concludes in these terms—"In witness whereof

**I have hereunto set my hand and seal this," &c.** There is, however, no seal, nor date; though it is clear that the deceased intended there should be both; as well as that the paper should be witnessed: it therefore is unfinished. An attempt is now made to take probate of this instrument simply on affidavits. What do they establish? Challis—a neighbour of the deceased, and in habits of intimacy with him—says “that he, some time about the end of October, 1827, in speaking with the deceased about wills, informed him, that as he had no freehold property, there could be no occasion for any witnesses to his will:” this then takes place three months before the death of Thomas, and, according to the wife’s account, before the paper was written. The remainder of this affidavit is made jointly with Pledge; and is merely to handwriting. The other affidavit is sworn by the wife—a party greatly interested: she says “that the will was written by the deceased on the 30th of December while he was confined to his bed-room; that he gave it to her to read, when she requested him to send for two witnesses, and that he replied—‘Challis had told him no witnesses were required,’ that the deceased then signed the paper and put it into his desk:” she further says—“that on the day before he died he lamented to her that his will was not witnessed, but trusted from what Challis had told him, that it would do as it was.”

This is a dangerous affidavit: the party is interested; the paper perhaps was written to please the wife; the Court cannot exclude the children on her evidence: There is not sufficient to satisfy the regular demands of the Court, viz. first, affidavits stating such a case as if proved by depositions would establish the paper; and secondly, consent implied or express from all parties interested: (a) here no consent can be given for the minor children; and if the Court were to grant probate, the executrix would give no security, and the children would be entirely at her mercy: while if the deceased were held to be dead intestate administration might be granted to the widow, and she would then give security.

Motion refused.

(a) Vide “In the goods of Herne,” ante 93; and “In the goods of Hurrill,” ante 107.

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### TALBOT v. ANDREWS.—p. 697.

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(On Motion.)

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Administration granted to one creditor, a decree, with intimation, having issued in the name of another.

ROBERT ANDREWS died in January, 1828, intestate: he left an only daughter, solely entitled to his personal estate.

A decree having been personally served upon her, to show cause why administration should not be granted to Mr. Talbot, a creditor; it was discovered, that it would be of no avail for him to take the grant, as he was already party to a suit in which an appearance for the administrator of Andrews’ estate was required. In consequence of this, an affidavit of

debt was made by Robert Kipling, another creditor of the deceased's estate; and *Pickard* referring to "Maidman v. All persons in general," 1 Phil. 51.(a) moved for administration to be granted, on the original decree, to Mr. Kipling.

Motion granted.

(a) See also *Law v. Campbell*, supra, p. 22.

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In the Goods of JOHN EDMONDS.—p. 698.

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*On Motion.*

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The Court will not on affidavit grant probate of an imperfect paper unless all the parties interested are consenting or cited.

THE deceased died on the 4th of June, 1828, a widower—leaving fourteen cousins-german (two abroad) his sole next of kin. A testamentary paper, in his own handwriting, dated the 19th of April, 1828, was found at his death: by this paper he had appointed Elizabeth Smith, (his niece by marriage, and who resided with him) and Isaac Hanson—executors: they were also the only legatees, and there was no disposition of the residue. This paper was signed, but there were no signatures to the attestation clause.

*Curties* moved for probate, upon the affidavits of the executors, and of Mr. Goddard—a solicitor—that the deceased was ignorant of the effect of an attestation clause; and that he expressed, to the latest day of his life, an anxiety that his will should take effect. Annexed to the affidavits was a letter from Mr. Goddard to the deceased, informing him that, in a will merely of personal property, subscribing witnesses were not absolutely required.

*Per Curiam.*

Here is a slight presumption against this paper which it is necessary to remove: the affidavits, however, show fully that the deceased intended it to operate without being attested, having been informed that no witnesses were necessary. But these affidavits are made by parties interested, and there is no proxy of consent, nor notice to the next of kin; and the Court cannot depart from the rule, that when application for a probate is made on *ex parte* affidavits, all parties interested must be consenting or cited.

Motion to stand over.

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*Note.*—On the second session of Michaelmas term, no appearance being given to a decree duly served in respect to the next of kin, who were abroad; and a proxy of consent, from the next of kin who were in England, being exhibited; the Court granted the probate.

Motion granted.

## SKEFFINGTON v. WHITE.—p. 699.

*On Petition.*

Where administration was granted in 1791, on the renunciation of the next of kin, to a creditor who died in 1806; when no *de bonis* grant was taken out till March, 1827, and when an administration, limited to a certain leasehold property, and granted at that time (without citing the next of kin) to a nominee of the persons in possession of such property, was in February, 1828, called in by the representative of the next of kin; such representative held barred by time and circumstances, and the administrator, who appeared under protest, dismissed with costs.

*Lushington and Addams*, on behalf of Sir Lumley Skeffington.

*Dodson and Haggard*, contra.

## JUDGMENT.

SIR JOHN NICHOLL.

This is a very long petition, going into a variety of details, and accompanied by numerous affidavits, though a few only of the circumstances and dates are sufficient for the decision of the present question. The facts are these:—

Thomas Hubbert died a bachelor in August 1790, nearly forty years ago, leaving two sisters solely entitled in distribution: they renounced, and probably had very good reasons for such renunciation; and in February 1791, administration was decreed to Alexander Hubbert, his partner, as a creditor. Alexander administered the estate for sixteen years till his death in 1806: and, as was truly stated, the sisters might then have come in and taken administration *be bonis non*: but they did not; and from that time until last year, no further representation was taken out. The deceased's estate, I have every reason to be satisfied, was insolvent; for it appears that the administrator entered into a composition with the creditors, who agreed to take fifteen shillings in the pound. As an additional circumstance it should also be remembered, that during the lifetime of Alexander Hubbert, no account was called for by the sisters, who were entitled to the surplus, if any surplus remained.

The deceased was possessed of some leasehold property at Bermondsey. The beneficial interest in these leases passed through several hands by arrangement and mortgages; but it is not necessary for the purposes of the present question to trace out all the different transfers, nor is this Court competent to decide in whom the title to these premises, legal or equitable, is vested: but the property having been sold by auction a little time ago, the purchaser (under the difficulties arising from the modern system of conveyancing) insisted that it was necessary, in order to make a good title, that the deeds should be executed by the personal representative of Thomas Hubbert, who had died thirty-seven years before, in 1790: Alexander Hubbert, the creditor administrator, having also been dead twenty-one years. It was at length ascertained that Sir Lumley Skeffington, as the son of one of the sisters, was next of kin, and entitled to the grant of administration. Application was made to him to facilitate the business, either by taking out a general, or a limited, administration.

Sir Lumley, who was in distressed circumstances, referred the parties to his attorney, who expressly stipulated that his bill should be paid by

the sellers, and not by Sir Lumley Skeffington. All the documents were laid before the attorney; and a very long correspondence took place between the two solicitors; nor am I competent to decide which was right, or which was wrong; but considerable difficulties were, as appears, raised to this consent. An account was required of Alexander's disbursements and administration, though I cannot but think that Sir Lumley Skeffington's solicitor ought to have been satisfied that the deceased's estate must have been insolvent. The negotiation, however, failed, and the sellers were left to their remedy. They, accordingly, applied to this Court for a grant to their nominee, Mr. White, of administration *de bonis non*, limited to these premises at Bermondsey. In March 1827, the administration limited as prayed was granted. In December 1827, the interests were assigned; the deeds were executed; and the conveyance was completed: and it was not till the end of Hilary term 1828 that a decree was taken out against White to bring in this administration; to show cause why it should not be revoked, and a general administration granted to Sir Lumley Skeffington. White appeared under protest, and stating that, under the circumstances, he was not bound to bring in the administration, prayed to be dismissed with costs.

Taking all that has occurred into my consideration, I think there is not sufficient ground of irregularity, either as to the want of title in the parties, or in the neglect of citing or serving Sir Lumley Skeffington with a process "to accept or refuse," to induce the Court to take the grant out of Mr. White's hands, and to decree a general administration to Sir Lumley Skeffington. I am of opinion that the citation under the circumstances was not necessary; but that he was barred by time, by events, and by his own laches.

What are the periods to which the Court must look? First, at the original grant: those entitled to the administration, renounced; and though that does not, in ordinary cases, bar next of kin who, on the expiration of such a grant, may come in and claim; yet they did not apply on the death of the creditor administrator, who lived sixteen years. It is not suggested that there was any surplus, or that the next of kin ever set up any interest or demanded any account: and the composition with the creditors, the incumbrances on the estate by mortgage and by annuity, besides other circumstances, do not leave the slightest reason to suspect that there was a surplus.

What is the next period? The creditor administrator dies in 1806, and for twenty years and upwards, no application is made for a representation. This lapse of years is tantamount to a fresh renunciation. Time must operate as a bar, or the business of the world could not proceed. Looking to all these circumstances, I do think the Court was fully warranted in granting the limited administration without citing the next of kin, for that creates an additional expense. I do not enter into the circumstances minutely—the strong fact is, that for twenty years there was no application for a *de bonis* grant: and after such an interval, a specious title even would form a ground for a limited administration. If it was now clear that the administration had been obtained surreptitiously, or for fraudulent purposes, the Court would have, and would exercise, the power of revoking it: but the facts prove directly the reverse.

Application was made to Sir Lumley Skeffington in June 1826. I will not say his refusal was malicious or vexatious, but it has somewhat of that character and appearance: the negociation was broken off, and his solicitor's bill was paid in September 1826. What does Sir Lumley Skeffington then do? he does not take out administration; he does not enter a caveat. It is said, that he had no funds, that he was advised it would require 150*l.*, that he borrowed that sum of a noble Lord, but that another solicitor defrauded him of it. This may be an excuse for himself, but it attaches no blame or imputation of fraud on the other party. The administration was taken out in March 1827; he says he was not apprized of it till July 1827—but what does he do? he lies by and does not call it in till February 1828. In the mean time there is no undue haste on the other side. The conveyance is not executed till December 1827; and when all the deeds and the letters of administration have been handed over to the purchasers' solicitor, and when the administrator is *functus officio*, then Sir Lumley Skeffington calls in the administration, and prays it may be revoked.

I do not think it necessary, under these circumstances, to enter into the question, in whom may be the legal, or in whom the equitable, title; for I am yet to be informed that whoever claims it cannot go into a Court of Equity and there assert his right. No step was taken here to stop the administration and I cannot now revoke it, nor disturb the present *bona fide* purchasers for a valuable consideration. It is sufficient that there is no ground to impute any fraud, nor indeed any irregularity in obtaining this limited administration; the representative of the next of kin having forborne for twenty years, and even, after he was apprized of all the circumstances, having abstained from applying till the limited administration had executed its purpose. I shall therefore allow the protest, and dismiss Mr. White with his costs.

Protest sustained.

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TALBOT and Others, by their Guardian, v. TALBOT.—p. 705.

Marriage and birth of issue is not an absolute but a presumptive revocation of a prior will; the law presuming an intention to revoke, arising from a change of condition and new obligations; if such change of condition and new obligations are provided for, and the intention to revoke cannot be presumed, the revocation does not take place. Therefore a will, in favour of the issue of a former marriage, is not revoked by a subsequent marriage and birth of issue; such marriage and issue having been provided for by settlement.

RICHARD TALBOT, late of Portsea, victualler, is the party deceased. By his last will and testament, bearing date the 19th of December, 1812, he appointed his children residuary legatees. (a) Upon his death,

(a) The testator, after charging a certain messuage and premises with an annuity of £150 per annum to his wife, Rebecca, for life, devised the same in these words; "unto such children as I may leave or my said wife be ensient with at the time of my decease, their heirs and assigns for ever, as tenants in common." And, after giving a certain dwelling house to his mother for life; and, at her death, to his brother, and his heirs, &c. for ever, thus went on: "I further devise all other my messuages, lands, and hereditaments whatsoever unto such children as I may leave or my said wife be ensient with at the time of my de-

a caveat on the part of the widow having been entered and warned, it was alleged on her behalf that, according to law, the deceased had died intestate. An appearance was then given for the deceased's three daughters (minors) by their guardian; and an allegation on either side was offered to the court.

For the daughters it was pleaded:—

1. That the deceased died on the 15th of November, 1827, leaving Mary Ann Talbot, his lawful widow—three daughters and a son (all minors) children by Rebecca, his first wife; also leaving by his widow (who at his death was pregnant) an infant son.(a)

2. That the will, dated 19th December 1812, was duly executed.

3. That on the 24th February 1823, his first wife died; and that on 5th October, 1824, he intermarried with Mary Ann Arnold, widow, who was possessed of freehold and personal property; that by settlement dated the 4th October, 1824, her freeholds were put in trust for her to receive, during life, the rents and profits, with remainder to the children of the intended marriage; that out of her personalty 800*l.* was to be raised, and immediately after the marriage, paid upon trust to apply the interest towards the maintenance and support of her daughter, Ann Arnold, until she should attain twenty-one, and then for her absolutely; and if she should die under age, the interest to the separate use of her mother for life, and upon her death the 800*l.* to be paid to the children of the intended marriage.

4. That the deceased at the time of executing his will was possessed of freeholds of the value of 6700*l.*; that at his death he had acquired freeholds to the amount of 16,000*l.*; that there were mortgages, on the estate purchased since the date of his will, to the amount of 5133*l.*, and an arrear of 650*l.* for interest; that his simple contract debts amounted to 2280*l.*, and that his personalty was of the value of 7000*l.*

5. That on the 29th of January 1827, the deceased having agreed for the purchase of a freehold house, declared to his friend John Vick—"I will tell you, Vick, when I married my wife she had a certain property of her own. I have a family by my first wife, and I do not intend to injure them, but I shall buy a little estate in the country which I will make sacred to my wife and her family."

6. That the deceased, on Monday, the 12th November 1827, was thrown from his horse; became speechless, and apparently senseless, and so continued till he died on the following Thursday; that the will was found in his iron chest, together with deeds, and other papers of importance.

For the widow it was pleaded:—

1. That the deceased in conversation with Archibald Low, his Solicitor, repeatedly told him, "that he must make his will, and that the will he had made would not do;" and that in or about September last,

cease, their heirs, &c. I also bequeath all my household goods, furniture, &c. to my wife for her own use and benefit, and 50*l.* to be paid to her within one month after my decease. I likewise give 50*l.* to each of my two sisters, and the residue of my personal estate in trust to apply the interest and dividends thereof for the maintenance and education of such children as I may leave or my wife may be ensient with at the time of my decease until they shall severally attain the age of 21, then upon trust to be equally divided among them."

(a) This son died before the hearing of the cause; and a posthumous child was born.

he made use of the following declaration—"I made a will about 16 or 17 years ago, (thereby meaning the will propounded in this cause) but that will not do; now I must have another, you shall make it, and I will fix an early day for the purpose."

2. That on or about Saturday previous to his death, the deceased, informing his wife that Mr. Nicholson intended to be at Portsea on the following Thursday, inquired of her "what she wished settled on her;" and on her saying "200*l.* per annum in addition to her own property," (of the annual value of 200*l.*) he replied, "he did not consider it too much," and that he would call upon his attorney, that the will might be ready for Mr. Nicholson—who was to be a trustee.

On the by-day of Hilary term these allegations were admitted; and the cause now came on for hearing.

*Lushington* in support of the will.

The question is, whether a will made during the lifetime of the testator's first wife, and after the birth of children, is revoked by a second marriage, and by the birth of issue? Under this will, I apprehend children by a future wife are not excluded; and they, as well as the widow, are provided for by settlement. There is not, then, a total disposition of the property exclusively in favour of the children of the first marriage. If the will be admitted to probate, a question may then arise whether the children of the second marriage are not entitled to take under it; but whether the will be established or not, the widow, in neither case, will be benefitted, for the personalty is absorbed by the debts. A presumptive revocation is, in this instance, rebutted by the circumstances. The declarations show the deceased's knowledge of the existence of his will; and that he would not injure his children by his first wife; and the wife and issue of the second marriage are provided for. The settlement of itself rebuts the original presumption of revocation; for it was held by Lord Mansfield in *Brady v. Cubitt*, 1 Doug. 31; and by Lord Chancellor Eldon in *ex parte Ilchester*, 7 Ves. 365; that where there was not a total disposition of the testator's property, the presumption would not operate.

*Phillimore*, for the widow and infant, contended, that the will, *prima facie*, was revoked; that revocation being founded on a change of circumstances in the deceased; and that, in this case, the facts were not sufficient to repel the presumption of law. The declaration to Low proved that the deceased intended to make a new will; by the will in existence the widow was totally unprovided for; and that, in respect to the settlement, it was solely of her own property, and which was secured to the daughter of her former marriage. *Hollway v. Clarke*, 1 Phill. 339; *Emerson v. Boville*, 1 Phill. 342; and *Sullivan v. Sullivan*, which is there cited, all established, that this Court requires some recognition, or some act, to show that the deceased's intention was, that his will should take effect.

JUDGMENT.

SIR JOHN NICHOLL.

When the allegations were admitted, the Court reserved the whole consideration of the question, which arises on this will. The will was made by the testator, then a married man, on the 19th of December 1812; and no dispute is raised as to its *factum*; by it he provides for his wife for life, gives a few legacies, and then bequeaths the residue of his real and personal property among his children. In February 1823, his

wife died, leaving four children—three daughters and a son: but there was no reason on her death to alter his testamentary disposition, because his property would go among his children exactly as he had intended in the event of his dying before his wife.

On the 5th of October, 1824, he married a second wife, Mary Ann Arnold, a widow, who had a daughter by her former husband and was also possessed of property of her own, both real and personal. Before their marriage a settlement was entered into, by which her real property, amounting to about 200*l.* per annum, was secured to the wife's separate use for life, and then to the issue of this marriage with Talbot; and 800*l.* was settled on her daughter by the first marriage, the interest to be applied to her maintenance, and the principal to be paid to her at the age of 21; and if she died before she attained that age, then the interest of this sum was to belong to the mother for life, and on her death the principal to go to her children by Talbot: so that, by this settlement, provision was made for his wife and the children by his second marriage; and it does not appear to me materially to vary the case, whether the provision was out of the husband's or out of the wife's property.

On the 15th of November 1827, Richard Talbot died leaving his second wife pregnant, and also one child by her. His four children by his first marriage likewise survived him. His will of 1812 he left in an uncanceled state, in his own possession, in his iron chest; and though he might talk of making, he never had made, a new will, nor taken any measures for that purpose. The question then is, whether this will of 1812 was revoked by his second marriage, and by the birth of issue? Now marriage and birth of children have never been held to be an absolute revocation; never more than a presumptive revocation, and the presumption may, under all the circumstances, be either not raised or repelled. The principle is this, that marriage and the birth of issue create such a change in the condition of the deceased, such new obligations and duties, that they raise an inference that a testator would not adhere to a will made previous to their existence, considering it an act of moral duty to revoke that disposition, in order to make provision for his new wife and new issue: but, on the other hand, if there does not arise such a state of circumstances as to produce new duties, if the change is provided for, there is no reason to presume a revocation. The question, after all, is one of presumed intention—whether to die intestate, or, notwithstanding the change of circumstances, to leave the former will existing and effective.

Here is a settlement providing for his second wife, and providing for the issue of his second marriage; that settlement must take effect notwithstanding the will and in exclusion of the children of the first marriage, while the property of the second wife must go to her own children; and if the deceased shall be held to be dead intestate, she and her children would share with the children of the former marriage; she, as widow, would take one third, and her two children a third of the remainder; that is, in addition to the settlement, they would take five ninths of the whole between them; excepting the realty, which forms the greater part of the deceased's property, and would go to his eldest son.

Under these circumstances there is no breach of moral duty—no neglect of new obligations in adhering to the former will. I am then of opinion that no presumptive revocation did take place: the marriage and issue were provided for by the settlement; the previous acts therefore

repel the presumption. And to me it seems that this view is in no way altered by the parol evidence. The deceased might have thought of making a new will, or of increasing his wife's jointure; and if he had used a part of her property, might intend to make her some compensation; but there is no reason to suppose he intended to die intestate. Inasmuch then as there is a provision regularly made for the second wife and her issue, I am of opinion that the will of the 19th of December 1812 is valid; and I accordingly pronounce for it.

Costs out of the estate were decreed.

## CONSISTORY COURT OF LONDON.

### ASTLEY v. ASTLEY.—p. 714.

In a suit for separation *à mensâ et thoro*, the wife's adultery being fully established, but she having, on a recriminatory allegation, proved facts antecedent to her adultery, from which the Court necessarily presumed the husband's adultery, this amounts to *compensatio criminum*, and the wife is entitled to be dismissed. *Semble*, going to a brothel, and remaining alone for a considerable time in a room with a common prostitute, is sufficient evidence from which to infer adultery. A married man going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery necessary to be rebutted by the very best evidence.

Slighter acts will bar than will found an original suit.

A single act of adultery is sufficient to bar the husband's remedy.

THIS was a suit of divorce brought by Sir Jacob Astley, Baronet, against Georgiana Caroline Astley, his wife, by reason of her adultery.

The parties were married on the 22d of March, 1819; and cohabited together till the elopement of Lady Astley with Captain Garth, on the 24th of July 1826.

A libel having been admitted, an allegation, on the part of the wife, charging Sir Jacob Astley with improper familiarities and adultery with abandoned women, was also admitted. The second, third, and fourth articles of this allegation, to which the witnesses, relied upon by the Court, deposed, were, in substance, as follows.

2. That in March 1826, Sir Jacob and Lady Astley (being resident in Leicester during the hunting season) went in an open carriage to the race-ground to witness a race, in which a horse of Sir Jacob's was to run; that Sir Jacob, leaving Lady Astley in the carriage, walked on the course with Mrs. Richardson, Lucy Burbridge, Charlotte Spawforth, and Mary Ann Webster, women of abandoned character; that he conversed immodestly with them, and drew up the petticoats of Burbridge, upon which a fear was expressed that Lady Astley would see and observe what passed: that after Sir Jacob had returned to Lady Astley's carriage, he sat at the back part of it, and kissed his hand to the women, and said "Girls, I will be with you at night, and I will give you a treat."

3. That in the evening of the same day, Sir Jacob introduced into a dining-room of the Bell Inn at Leicester, several women from the

street; that he gave them spirits and wine, after which he and the women made so much disturbance, and their conduct towards each other was such, that the women were sent out of the house.

4. That on the next evening Sir Jacob, accompanied by some gentlemen, went to Richardson's; that he gave her money to procure wine and spirits for Burbridge, Spawforth, Webster, and other women who were present; that he continued in company with these women for some time; that indecent familiarities passed between him and Lucy Burbridge, and at length they retired to a bed-room, in which they were alone for about half an hour (with the door locked on the inside) when they committed adultery.

Upon the depositions taken on these pleas, the cause was argued by the *King's Advocate*, *Phillimore*, and *Addams* for Sir Jacob Astley; and by *Burnaby* and *Dodson* contra.

The libel was admitted to be fully proved; and the only question raised was, whether the evidence on the allegation was sufficient to establish the guilt of the husband.

#### JUDGMENT.

DR. LUSHINGTON.

This is a suit promoted by Sir Jacob Astley, baronet, against his wife, Lady Astley, for separation by reason of her adultery. The marriage of the parties in 1819, their subsequent cohabitation, and the birth of children, are admitted to be fully established: nor is any objection raised to the proof of the adultery with which Lady Astley is charged. It is perfectly clear that in July, 1826, she quitted the house of her husband in Grosvenor Street, and eloped with Captain Garth, with whom her cohabitation is very distinctly proved and admitted. There is no question, therefore, that Sir Jacob Astley will be entitled to the remedy he prays, unless the recriminatory allegation of Lady Astley—for she has replied to this suit, not by denying her own adultery, but by charging her husband with a similar offence—is so proved as to call upon the Court to dismiss her from all further observance of justice.

It is unnecessary to consider the terms upon which the parties lived previous to the month of July 1826; there is nothing sufficiently established in the cause to enable the Court to form any judicial opinion on this point, anterior to that period. In the beginning of the year 1826, these parties went to Leicester; and it is, during their residence in that town, that Sir Jacob Astley is accused of having there formed a connexion with divers women of bad character; of resorting to a house of ill fame, and of committing adultery. This is the substance of the charge. There are other accusations of a minor nature, but they are of weight only as tending to corroborate those of a graver character.

The evidence, in respect to these charges, in part consists of the testimony of Mary Richardson, who kept this house of ill fame, and of three common prostitutes. Now the testimony of these witnesses requires the most vigilant and accurate examination; for, independent of their character, their manner of giving evidence, and their mutual contradictions, ought to put the Court on its guard where their depositions are not confirmed by more credible testimony. There is throughout their examinations a manifest disregard of truth. The discrepancies are numerous and have been pointed out. It is quite impossible to look at the testimony of Mary Richardson without perceiving that she has deposed with very little sense of the obligation of an oath; and, as to the three

other women, they would probably be as willing to bring their evidence to market, as they were ready to offer their persons to sale. But there is, in addition, the testimony of other persons of a very different description, upon which the Court can more safely rely.

The facts appear to be as follows: It is proved that Sir Jacob Astley had asked one of his acquaintance, a witness in the cause, to show him the house of Mary Richardson; and that he went there. It is clear that nothing criminal took place on the occasion of that visit; but, at the same time, it must not be forgotten that Sir Jacob Astley was then perfectly aware of the character of this house. The next fact is an occurrence on the race-course on the day of the race. It is impossible to reconcile all the evidence on this point; but it is sufficiently proved, that Sir Jacob Astley said to the three women, to whom I have already referred, "If I win the race, girls, I will give you a treat to night." The evidence also establishes, that Sir Jacob Astley, while on the race-ground, hooked up the petticoats of a woman of a bad character. None of these acts import the degree of criminality necessary to debar the husband from the relief he prays; yet they ought not to be left out of the consideration of the Court, because they show that, even at that time, he had some acquaintance with these women.

The decision, however, in this case, must depend on the occurrences which took place at the house of Mrs. Richardson, either on the evening of the race, or on the evening after. This part of the case is proved by three gentlemen, associates of Sir Jacob Astley: leaving out of consideration the testimony of the other witnesses. It is proved that Sir Jacob Astley went to Mrs. Richardson's from a dinner-party at the Bell Inn; that he went up stairs with one of the women, and that he remained alone with her at least a quarter of an hour. These facts are demonstrated: they are undenied and undeniable. It has been urged that the going to this house was unpremeditated and accidental, and was in order to protect one of the party who had been assaulted. This may be possible; yet I cannot help thinking there was something in the nature of an anterior appointment on the race-course; or, if the visit were unpremeditated, it would lead me to a conclusion that Sir Jacob Astley had been at this house on more than one occasion, as asserted in the evidence of the women. I am not, however, disposed to conclude positively, either that this visit was in pursuance of an actual engagement, or that it was accidental. I take the fact as I find it—that Sir Jacob Astley was there, and remained alone in a room with a woman of notorious character for a considerable space of time, as already stated: and on this state of facts the questions are; first, whether or not a legal presumption of the commission of adultery arises; and secondly, supposing that it does arise, whether it is sufficient to bar the husband of the remedy he now seeks?

It cannot be denied that Sir Jacob Astley could not have a more ample opportunity of committing an act of adultery than at a house of ill fame, and alone, at least for a quarter of an hour, in a room with a common prostitute.

If these facts are not sufficient to raise a presumption of adultery, what facts would be sufficient? All the probabilities unite in this conclusion, that Sir Jacob Astley would not have placed himself in this situation except for a criminal purpose. But even if the conviction of the Court did not lead it to that inference, there are authorities which bind it to con-

clude that, in such circumstances, adultery has been committed. In *Eliot v. Eliot*, mentioned by Lord Stowell in *Williams' case*, [1 Consistory Reports, 302. See also *Popkin v. Popkin*, *infra*, (Supplement) *notis.*] it was held, "that a woman going to a brothel with a man, furnished conclusive proof of adultery." Now, if a married man goes to a brothel, he being perfectly aware of the nature of the house, I will not say that it does not supply an equal presumption of guilt as in the case of a woman; but supposing the Court not inclined to push this presumption so far as to hold the proof conclusive, still it cannot be denied that such conduct furnishes a violent suspicion—a suspicion that must be rebutted, if rebutted it can be at all, by the very best evidence.

Now what is the evidence to rebut the suspicion in the present case? As to the testimony of Lucy Burbidge, with whom Sir Jacob Astley was shut up, it is impossible that the Court can give any credit to her denial: she is a witness not to be listened to; and in respect to the opinion of the three gentlemen, who were also in this house at the time, that no act of adultery was committed, it is, I apprehend, the duty of the Court to draw its own conclusions, and not allow itself to be led away by the abstinence of the witnesses. In *Elwes v. Elwes*, 1 Consistory Reports, 278, Lord Stowell said: "If the facts are of such a nature as justifiably, and almost necessarily, lead to a conclusion of guilt, the scepticism of a witness, even if it really exists, signifies nothing. The Court, representing the law, draws that inference to which the proximate acts unavoidably lead; and therefore if the witnesses, even in this case, hesitated, and paused about drawing that conclusion, I should not conceive myself, in any degree, limited by their hesitation." To this opinion I entirely accede; and it does appear to me that the circumstances of this case raise so strong a suspicion of adultery, that it is scarcely possible to be rebutted by any evidence; but, manifestly, not by the evidence before the Court. And when I consider that Sir Jacob Astley is the party proceeding against his wife for a divorce, and that this matter is merely recriminatory, and set up to bar his remedy, I also feel myself bound by the reference, in the argument, to the case of Lord and Lady Leicester; [cited in *Forster v. Forster*, 1 Consist. Rep. 153. See also, *Durant v. Durant*, *infra*, (Supplement.) *D'Aguilar v. D'Aguilar*, *ibid.* and *Beeby v. Beeby*, *ibid.*] "that where adultery is pleaded by way of recrimination, and as a bar, it is not necessary to prove such strong facts, as are required to convict the other party." It was said, this is a loose doctrine; I will not stop to consider it, but shall pass it with this observation; that the doctrine has received the sanction of Lord Stowell, and is binding on this Court. I am, then, of opinion, that the charge against Sir Jacob Astley is sufficiently established. If, however, he is really innocent, I can only regret that he has voluntarily exposed himself to such an accusation; but if a man will associate with common prostitutes, as Sir Jacob Astley is proved to have done, whether he be guilty or innocent, every court of justice must, I think, come to the same conclusion to which I have arrived in this case.

The only remaining question is, whether, as there is no proof of further adultery, the husband is debarred by this single act from the remedy he seeks?

Many arguments have been urged as to the hardship that Sir Jacob Astley will incur from the refusal of a sentence of separation: but this is an inconvenience which he has brought upon himself, and which the

law imposes upon him. Similar arguments were also strongly urged in the case of *Proctor v. Proctor*, but were overruled, 2 Consistory Reports, 295-6. It is also to be remembered, that the wife will equally suffer inconvenience, if a sentence be given against her, and she be turned loose upon the world.

Now, in support of the argument that one act of frailty is not sufficient to bar a husband of his remedy, only one case has been cited, viz. *Naylor v. Naylor*, Consistory, 1777. Trin. term, 4th sess. I have obtained a note of that case, and since it is desirable that misapprehension should not exist as to the doctrine there held, nor as to the opinion of the judge, I will read that note. Dr. Bettesworth, who then presided in this Court, said: "This is a cause of restitution of conjugal rights brought by the wife against the husband: in bar he pleads adultery: she recriminates. There are no less than thirteen witnesses to prove the adultery of the wife. She has not only committed the crime of adultery, but a series of adultery is proved, so that of her guilt there cannot be a doubt. On the other side, the counsel rely that they have made full proof of adultery by the husband; and that according to the law of the Ecclesiastical Court, if they have fully established his guilt, that will prevent his obtaining the effect of his prayer. But here is only a single witness to a fact, and *all circumstances are against her*; it would not, therefore, be sufficient even if her evidence were without exception. She then being a single witness must be laid out of the case. It might be a question if a wife left her husband and lived many years from him, and in a course of adultery, whether, if the husband in one frail moment should be faulty, it would be a *compensatio criminis*? The words imply, 'You have been as guilty as I have been:' but in this case it is not necessary to consider; for two persons have deposed in a way not to be relied upon; and Mrs. Naylor has bribed witnesses—a circumstance alone sufficient to repel their credit."

In this case then of *Naylor*, the learned Judge stated that it might be a question whether, when a wife left her husband, and lived in a long course of adultery, it would afford a *compensatio criminis*, and whether a husband ought to suffer for one frail act? but it will be observed, that the case itself was decided on a totally different ground; the learned Judge decided there was no proof of adultery; he merely put an hypothetical case, which is materially distinguished from the one before me. In that hypothetical case, the wife was supposed to have quitted her husband, and lived for several years in adultery; now here, the wife had not quitted her husband, and continued in adultery previous to his guilt: on the contrary, the husband is charged with adultery anterior to the separation, and to her criminality. The cases, therefore, are quite separate and distinct; but at the same time I must be permitted to say on the authority of *Proctor v. Proctor*, a case to which I have already referred, that a *compensatio criminum* is effected by the guilt of both parties.(a) But the present case does not alone depend upon an act of adultery committed in one frail moment; for, here, it is distinctly proved that, on one previous occasion at least, he had gone to this brothel, and that he had taken liberties with these women, and with other abandoned females.

I, therefore, come to this decision, that the conduct of Sir Jacob Astley bars him of the remedy he prays, and that Lady Astley be dismissed from this suit.

(a) See *Beeby v. Beeby*, infra, (Supplement.)

## POLLARD, falsely called WYBOURN, v. WYBOURN.—p. 725.

In a suit of nullity by reason of the impotency of the man, a certificate (twelve years after marriage) that the woman was *virgo intacta* and *apta viro* coupled with two several confessions by the man of his incapacity to two medical witnesses, and with proof that the woman's health had suffered; though the man had not given in his answers, had removed into France, and refused to undergo surgical examination, held sufficient.

THIS was a suit of nullity by reason of the man's impotency. The *de facto* marriage took place in April 1815, the man being of the age of forty-one; the woman, seventeen.

A month after marriage, the man took to a separate bed: afterwards from October 1815 to the spring of 1816 she resided with her father; and the man, though generally absent on military duties, occasionally slept in the same bed, but from the spring till October of 1816, he abstained altogether from cohabitation; and then the parties again lived together as man and wife for two months, after which he volunteered to St. Helena. He returned in 1819; but concealed his return from the other party for three weeks; but there was regular matrimonial cohabitation, with slight intervals, from that time till April 1823. At that time her health having greatly suffered, she by the advice of her medical man took to sleep separately, and never afterwards returned to Mr. Wybourn's bed. About May, 1826, they finally parted, and towards the close of that year this suit was instituted. A medical certificate fully proved that the marriage had never been consummated, and that though *virgo intacta*, she was *apta viro*. The man had been personally served with a monition at Cassel, in France, to submit himself to medical inspection, but had not obeyed the process.

The *King's Advocate* and *Nicholl*, for the woman.

*Phillimore* and *Pickard* contra.

JUDGMENT.

DR. LUSHINGTON.

In this case, a *de facto* marriage was celebrated in August 1815, and the parties continued to cohabit together at intervals, as man and wife, till the spring of 1823, when, as appears by the evidence of Mr. Parkin, a medical man, they ceased by his advice to occupy the same bed, in consequence of her health having suffered. They, however, lived under the same roof till May 1826, when Mr. Wybourn quitted the country.

The Court has been put upon its guard against collusion. I am well aware that the Court should be very cautious, if collusion could reasonably be suspected; but there is no circumstance in this case to lead me to imagine that any thing of the sort exists. I cannot presume collusion, without something to raise such a presumption. The question then is, whether the evidence is sufficient; whether there is an absence of what is essential to the final adjudication of the cause. I am of opinion that there is satisfactory evidence that the cohabitation lasted considerably longer than what the law generally requires; much more than three years. The ground of the separation is not to be laid out of the case; it is part of the *res gestæ*. Now, that it arose in consequence of the loss of health, and from her sufferings, appears from the evidence of Mr. Parkin: he says "that about six or eight months after Christmas 1822, they, by de-

ponent's advice, ceased to occupy the same bed: it was, on her account, and in consequence of her health having suffered, that the deponent gave this advice." Again on the 14th article, he says "he was attending Mrs. Wybourn professionally in 1823, and having ascertained the cause of the deplorable state in which she was, the deponent advised she should withdraw from the bed of her husband."

The Court always requires a certificate of medical persons as to the state and condition of the woman. In the present case that certificate has been given by Mr. Parkin, who appears to be a surgeon of eminence, and by Mr. Blagden, who undoubtedly is. It has been argued, that the test on which the certificate is framed is too vague and uncertain; that the Court cannot rely on it. Now the present certificate is according to the practice invariably adopted—not to give reasons; and I should be extremely reluctant to depart from that practice. In the first place it is a received maxim "*cuiuslibet in arte sua credendum est.*" Secondly, if the grounds were given, how could the Court comprehend the reasons, and decide between conflicting opinions? besides, the introduction of the grounds would lead the Court into minute inquiries about matters, the discussion of which the Court would be most anxious to avoid unless it were imperatively called upon to pursue the investigation. Here are the very strongest grounds to presume the impotency of the man. If the parties lay together in one bed for so many years, of such ages, and the woman is certified to remain *virgo intacta*, there cannot be a stronger presumption that impotency existed, and that it was incurable. Such a lapse of time satisfies the Court that in all human probability he was incapable of consummating the *de facto* marriage: but this is not left to inference from these facts only; for two direct admissions by him to two different surgeons are proved. I never can think that these lead to any thing but a direct acknowledgment of his incapacity. The first of these admissions was made previous to his departure for St. Helena in 1816, "that he was then incapable of performing marriage rites;" and the second confession was in 1823 "that he was impotent; that whenever he had made the attempt to have connexion with his wife he had failed." These confessions were made at periods so long anterior to the institution of this suit, that there could have been no inducement to fabrication.

It is said, that the law requires that the party's answers should be given in, or that he should submit his person to medical inspection. If this were the true rule, the man would only have to withdraw out of the reach of the process of the Court, and thus defeat the ends of justice, and defraud the woman of her remedy. The law never imposed such difficulties upon any Court. (a)

It being perfectly clear that the monition was personally served, and that the party consequently has had fair notice of these proceedings, he surely would have come forward and rebutted the charge, if he had had the power. The Court however cannot refrain from going still further in this case; for suppose the party had appeared, and the certificate from his inspectors had been couched in the same terms as in *Greenstreet v. Cumyns*, 2 Phill. 10, which rather supported his capacity than proved

(a) "Quamvis utroque conjuge fatente impedimentum, ac triennio lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium." Sanchez de Matrimonio, Lib. 7. disp. 108. No. 6.

his impotency; even in that case, the Court would not go to the length of saying that the woman's remedy would have been barred.

In this case I am satisfied there is no collusion, and that there is as much evidence as the law requires; and I therefore pronounce the libel fully proved, and that the lady is entitled to the sentence she prays, and that the defendant must be condemned in the costs of this suit.

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The Office of the Judge promoted by  
NORTH and LITTLE v. DICKSON.—p. 730.

Provocation is no defence to a criminal suit for brawling in a church at a vestry meeting. On proof of the offence, the defendant suspended for a fortnight *ab ingressu ecclesiæ*, and condemned in costs.

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## Supplement.

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### ARCHES COURT OF CANTERBURY.

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#### DURANT v. DURANT.(a)—p. 733.

In a suit for divorce on account of the husband's adultery after a condonation of former adulteries; there must be, in order to establish condonation of subsequent adultery as a bar to the wife's remedy, evidence that she was aware of this renewed misconduct; nor can such knowledge be inferred from slight facts, and from cohabitation, but it must be clearly and distinctly proved.

If a wife forgives earlier adultery upon condition and assurance of future amendment, on the husband's again committing adultery, that previous injury revives.

When the husband's adultery is to be proved by pregnancy and acknowledgment of children it is not necessary to plead particular acts.

Evidence extracted upon cross-examination (in order to show condonation, *compensatio criminum*, or to discredit one adverse witness by another) if relied on as the sole ground of defence has far slighter effect than when a defensive, recriminatory or exceptive plea is given in and examined to.

In examining evidence and proofs, the Court must not take the charges insulated and detached, but the whole together, and must consider what has been the admitted conduct of the party under similar circumstances.

*Quære*, whether condonation, unless as far as is admitted by the adverse case, can be set up without being pleaded. *Semble* that in no case has it been held to estop a party where not pleaded.

Condonation is not presumed, as a bar, so readily against the wife as against the husband.

Entering into a voluntary deed of separation and bringing an action on that deed do not bar a wife from proceeding for a divorce in the Spiritual Court: nor bear unfavourably on her case.

(a) Vide supra, p. 231.

Condonation is forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness: on breach of the condition the right to a remedy for the former injuries revives. Cruelty will revive condoned adultery, and less is necessary to revive than to found an original sentence.

A groundless and malicious charge against the wife's chastity followed up by turning her out of doors, and not attempted to be pleaded nor proved, may be alleged with other acts of cruelty as a ground for separation. *Quære*, whether it would not revive condoned adultery?

THIS was a suit for divorce, *à mensâ et thoro*, brought by the wife against her husband by reason of his adultery. The facts of the case are fully detailed in the judgment; and it is unnecessary to state more than that it was admitted that the adultery of the husband was fully proved; and that on this fact coming to the knowledge of the wife she, on two occasions, separated herself from her husband, but afterwards returned to cohabitation; first, on a promise of future good conduct; and, secondly, from want of means of subsistence when near her confinement. The husband afterwards accused her of adultery, and turned her out of his house. Further acts of adultery on his part, subsequent to her return to cohabitation, and also subsequent to his having forced her to leave his house, were alleged. No charge was brought forward in plea against the wife: and the questions of fact principally were, whether the later acts of adultery were established; and whether the wife, at her return to cohabitation, was aware of all the earlier acts of adultery?

In the course of the argument the Court read the following note of *Worsley v. Worsley*, Consistory 1730, Mich. Term, 3d Session.

"In this case several facts of cruelty and adultery were charged by the wife in an allegation offered by her, which were laid to have been committed some years ago; since that, there had been a reconciliation between the husband and wife; and since that reconciliation he was charged in this allegation with fresh acts of cruelty, but with no new acts of adultery.

"*Dr. Cotterell*, for the husband, said, that as he was charged with fresh acts of cruelty since the reconciliation, they would indeed revive the former acts of cruelty before the reconciliation, but since no adultery was pretended, the former acts of that kind did not come within the rule, therefore all the articles of the allegation relating to the adultery were irrelevant, and ought to be struck out.

The Court (*Dr. Henchman*) held clearly that "the new acts of cruelty would revive the whole, as well the acts of adultery that were committed before the reconciliation (though there were no new acts of that kind,) as also the acts of cruelty, and that the wife was now as much at liberty to charge her husband with those former acts of adultery, notwithstanding the reconciliation, as she would have been if there had been no reconciliation at all."

After reading this case, the Court said:—

I wish to hear a full argument on the doctrine of Condonation; its principles, and the authorities respecting it. What takes off its effects, and revives a former charge? Will any offence, short of subsequent adultery, namely, an approach to adultery, set aside condonation as a bar? Will solicitation of chastity have that effect? Must the injury be *ejusdem generis*? Will cruelty revive adultery? If so, will any thing short of what would substantively and separately establish a case of

cruelty? Will an unfounded charge of adultery, of which there is not a tittle of proof, against a mother with twelve living children, and an unjust dismissal of the wife from her husband's house, be sufficient to revive condoned adultery? Can condonation be set up as an effectual bar without being pleaded?

*Lushington and Dodson* for Mr. Durant.

We do not find that the questions put by the Court have received judicial consideration:

1. Whether condonation is necessary to be pleaded? It is not absolutely necessary, but it may be convenient and proper; because otherwise, as the party applying for a divorce should have a knowledge of the defence, we admit the party would be at liberty to plead after publication, or the Court *ex officio* might order further proofs. *Elwes v. Elwes*, 1 Consistory Reports, 292. That condonation ought to be pleaded may perhaps rather be inferred from *Oughton*, tit. 214. s. 2. But this is on the general ground, that there should be notice of the intended defence; but that reason does not hold here, because the wife herself pleads condonation; "*qui ponit fatetur*." Neither *Ayliffe* nor *Sanchez* lay down that it is necessary to plead condonation. If on cross-examination it appeared clearly that there had been subsequent cohabitation, the Court would allow the other party, at any period of the cause, to deny condonation.

2. Condonation is where a husband or wife, cognizant of the adultery of the other, is voluntarily reconciled. *Ayliffe's Parergon*, 226. In that case the party is barred from complaint. Mere residence in the house without actual conjugal cohabitation is no condonation. "*Si enim*," says *Sanchez*, "*essent in eadem domo non se alloquentes, divisique à mensâ et lecto, non censeretur condonatum adulterium*." *De Matrimonio*, lib. 10. disp. 14. s. 17. But here there is no doubt of conjugal cohabitation.

3. A repetition of the same injury, no doubt, revives condoned adultery; and we admit that something short of it may possibly have that effect; as for instance, solicitation of chastity, or whatever indeed would bar a husband from complaining of his wife's adultery: but it must be an offence *ejusdem generis*: and if that be so, the proof here is of adultery or of nothing. The only reported case in which the doctrine of revival was discussed is *D'Aguilar v. D'Aguilar*, 1 Consistory Reports, 135, *notis*. It is there laid down, that, to revive cruelty, the subsequent facts must be such as would be sufficient to found a sentence. It may be said, that a harsh course of treatment ought to revive, but if any thing short of legal cruelty is admitted, there would be no certain rule. By analogy this rule should apply to adultery: then nothing short of adultery would revive; certainly nothing less than solicitation of chastity.

4. It is impossible, we submit, to maintain that cruelty would revive adultery. We cannot find any case to that effect, except the note of *Worsley v. Worsley*, which is very unsatisfactory as a precedent; nor are we aware that it is so laid down in any authorities. It is not necessary to revive the adultery, for cruelty would of itself be a ground for divorce: it is not *ejusdem generis*. It is laid down that "condonation is a conditional forgiveness which does not take away the right of complaint in case of a *continuation of adultery*." *Ferrers v. Ferrers*, 1 Consistory Reports, 130. Even *Sanchez* does not suggest that condoned adultery could be revived by any thing short of adultery. If cruelty

would not revive it, *a fortiori*, harshness, or less than legal cruelty, would not suffice.

5. Would an unfounded charge of adultery revive? It is true, that adultery on the part of the wife is not pleaded, and that Mr. Durant did charge her with that crime. Though he might be misinformed, yet he acted *bona fide*, for he employed a solicitor, collected evidence, and laid it before a friend. A case might easily be supposed in which there were good grounds of suspicion, and for requiring explanation, such as loose conduct, and indecent expressions; and yet not sufficient to offer a plea.

*W. Adams and Jenner* for Mrs. Durant.

The adultery, both prior and subsequent to the renewed cohabitation, is fully proved, and the condonation of the previous adultery is not established, inasmuch as Mrs. Durant is not shown to be cognisant of the birth of Bradbury's third child. The books require a *notitia probabilis*, meaning by that phrase pretty full proof, as three instances in Oughton show. (a) These instances all refer to condonation by the husband, which has always been held to be more easily presumed than condonation by the wife. We proceed then to examine the question proposed by the Court, though we disclaim the necessity, as we deny any condonation.

The cases as to condonation are few, and the books not specific.

1. As to its nature. It is a conditional forgiveness: it may be made by a wife, but does not necessarily result from a continuance of cohabitation only.

2. Condonation is hardly possible to be presumed against a wife without being pleaded, as it is capable of many explanations. It is said, the wife has pleaded it herself: we deny it, she has only pleaded facts from which it has been argued that condonation is to be inferred. It is admitted the husband could not rest on it if brought out by interrogatories alone; here the knowledge of Bradbury's third child is attempted to be shown only by interrogatories. If the wife had had notice that condonation would have been objected, she might have pleaded her ignorance. It is said, that in *Elwes v. Elwes*, condonation by the husband was not pleaded; but the Court there lays down, that it must be admitted with extreme caution, if not pleaded. In that case too the alleged condonation was on the part of the husband; and the Court does not notice it as a plea in bar, but as a circumstance requiring explanation. If then, with the dictum "*Causa nunquam concluditur contra Judicem*," the Court is so cautious of noticing unpleaded condonation, surely it cannot be competent for the adverse party to take advantage of it. In *Beeby v. Beeby*, Consistory, Mich. Term, 1799, (for the judgment in this case, see *post*), condonation is further observed upon by Lord Stowell, in the same guarded language: "The Court would not say that condonation might not come out in evidence, though unpleaded, but the

(a) "*Probabilis scientia dicitur, si maritus, suspectam habens uxorem de adulterio, eam de eodem accusaverit, et illa hujusmodi crimen confessa fuerit. Vel testes illi, quos maritus in judicio contradictorio ad probandum adulterium objectum produxit, significaverint marito, ante litem institutam, se posse deponere ex propriis eorum visu et scientia de hujusmodi adulterio. Vel si maritus uxorem suam in ipso actu adulterino deprehenderit.*"—Oughton, tit. 214. s. 3.

Court would not help it out." In *Ruding v. Ruding*(a) it was said; "the Court has never gone the length of holding mere delay as a bar against the wife. If it could be shown that the wife's conduct amounted to licence, it would be matter of defence; but it must be pleaded." A plea in bar cannot then be treated as a matter of defence if not pleaded, though the Court may notice it. Oughton speaks of condonation as necessary to be pleaded, and proved; "*si allegaverit et probaverit*:" this is conjunctive and not disjunctive: the proof will not do without the plea, any more than the plea without the proof. Sanchez and Ayliffe may not notice the necessity of pleading condonation, because they suppose that of course it must be pleaded.

3. It is not denied that condoned adultery may be revived by subsequent adultery. The law is not explicit that minor acts would be sufficient; but there is nothing to show that the husband's return to the *mens adultera et rea* is not sufficient. The implied condition is, that he shall not return to impure practices. It is said in *D'Aguilar v. D'Aguilar*, that to revive forgiven cruelty there must be legal cruelty; but even if that were true to its full extent, there is a distinction between the relief for cruelty and adultery. In the former the protection is from present danger, and the extent of the offence must be known to the complainant. The latter is secret, and therefore evidence of the *mens rea* may be sufficient. Here is the *mens rea* at least by solicitation of chastity.

4. Where there is harshness or any thing short of legal cruelty, the Court will at least be very cautious of inferring condonation from cohabitation alone; and even as to removing undoubted condonation, it cannot be correct that the subsequent cruelty must be of itself sufficient to found a sentence. Suppose serious cruelty during cohabitation; a separation and return; would it be necessary to prove actual cruelty for separation afterwards? Would not the former conduct give colour to threats or harshness? The wife must be able to enjoy the *consortium vitæ*; that must be the implied condition, and any thing that would destroy the *consortium*, and drive her from cohabitation, would revive cruelty or adultery. The case of *Worsley v. Worsley*, as stated, seems to confirm this, and to show that cruelty would revive adultery.

(a) *Ruding v. Ruding*, Arches 1819, Hil. Term, 2d Session.

This was a suit of separation brought by the wife for the husband's adultery: the parties were married in 1796. In 1802 they went to reside in France, and were there detained on the commencement of the war. Mrs. Ruding returned to England in 1806. In 1808 the husband was pleaded to have commenced an adulterous intercourse with a French lady, by whom he had five children: he returned to England in 1815, and continued to live in open adultery till the commencement of this suit, on the first session of Michaelmas Term, 1818.

*Per Curiam* (Sir John Nicholl.)

It is admitted, *in limine*, that the rejection of the libel would be a strong measure, but it is contended that the circumstances would justify it. It seems to be admitted, that while the husband was in France there was no improper delay. Since his return three years have elapsed, but I am not aware of any case where the Court has gone the length of saying, that a mere lapse of time is a bar to the wife. If it could be shown that the wife, for three years, had connived; that her conduct amounted to licence, it would be defensive, but must be pleaded. I admit this libel, as on the face of it there is nothing which amounts to a bar to the wife's prayer.

*Note.* The case of *Ruding v. Smith*, falsely calling herself *Ruding*, (2 Consistory Reports, 371.) was between the same parties.

5. The accusation of adultery with the tutor of her children comes under the head of the most aggravated cruelty. The husband had no business to make, still less to insinuate, charges of this nature. If he withdrew the allegation, he ought to have withdrawn the interrogatories; but he has persisted in them at the very hearing. We are not aware of any cases allowing the wife to retire from cohabitation upon such an accusation alone; but here the Court must look at all the conduct of the husband, and all the circumstances of the case. What remedy can the wife now have? Is it possible for her to bring a suit of restitution? Such an accusation is a ground of divorce by the civil law. Thus Huber, in treating of divorce says; "*contra virum mulieris proditæ sunt quatuor causæ*," and mentions as the second; "*si uxorem de adulterio temerè accusaverit*." Huberi Prælectiones, Lib. 24. tit. 2. s. 11. And the Novellæ, in the chapter "*de justis divortii causis mulieri concessis*," furnish this passage: "*Si vir de adulterio inscripserit uxorem et adulterium non probaverit, licere mulieri volenti etiam pro hac causâ repudium destinare viro, et recipere quidem propriam dotem, lucrari autem et antenuptialem donationem*." Novell: 117. c. 9. s. 4. Though not a substantive ground of divorce here, these principles may well be applied, under all the circumstances, to this case.

## JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for separation by reason of adultery brought by the wife against her husband, and begun in the Consistory Court of Lichfield; from whence it came up here on an appeal from a grievance: vide 1 Add. 114. It is unnecessary to state more of the proceedings than that they commenced in January 1820, and have been depending five years. This delay is attributable alone to the husband, but I shall not particularly refer to it further than may bear upon the proof of the facts applying to the merits of the question.

The libel states the history of the parties, and the grounds of the present charge.

The parties were married in February, 1799; George Durant being a gentleman of fortune, the proprietor of Tong Castle, Shropshire; and Mrs. Durant, then Mary Ann Eld, a spinster, of age, whose family resided in the same neighbourhood. During their cohabitation, the parties lived at Tong Castle, and had fourteen children, twelve of whom are now living. The facts thus far are proved, and are not controverted.

The libel proceeds; and Mr. Durant is charged with having formed, in 1807, an adulterous connection with Mary Bradbury, and with having had three children by her; the first born in July 1808; the second in March 1810; the third in December 1811; and he is alleged to have acknowledged and supported these children. He is also charged with having formed another adulterous connection with Elizabeth Cliffe, by whom he had a child born on the 19th of June, 1809: both these persons were nursery maids in his family. In 1816 he is charged with an adulterous connection with Mary Dyke, his dairy maid; of that connection no child was born which he acknowledged, but it is alleged that in June 1816, he was seen with her in the criminal act. In 1818 he is charged also with an adulterous connection with Jane James, a labourer's wife, and on the 4th of November with having been caught in the fact on the floor of her cottage. In 1820 there is a similar charge with an-

other labourer's wife, of the name of Starkey; and, on the 26th of April 1820, it is asserted that he was caught in the fact in a room in her cottage called White Oak Lodge. These are the several adulteries charged.

The libel further pleads: that, in January 1808, in consequence of the preceding adultery, Mrs. Durant withdrew to the house of her father, Francis Eld, Esq. at Seighford, in Staffordshire. Durant, upon that occasion, wrote a letter to her brother, confessing his misconduct, expressing contrition, and promising future good conduct. That letter is exhibited, and I shall have occasion hereafter to refer to it.

The libel then pleads, that in consequence of the assurances contained in this letter, Mrs. Durant was induced to return; but, in 1810, Durant continuing his adulterous conduct with Bradbury and with Cliffe, Mrs. Durant again withdrew to her father's house: Durant went there; and she agreed, that if he would leave Tong, break off his connection, and go to reside in Devonshire, she would again cohabit. They accordingly went to reside in Devonshire, and afterwards removed to Bath. Durant then proposed to return to Tong, but she refused because Bradbury lived in the neighbourhood: accordingly, at the latter end of 1810, they separated; he returned to Tong; she went to reside in London, accompanied by one of her daughters. She remained there till near her confinement, (for during these cohabitations she had become pregnant) when, being in want of necessaries, and obliged to sell part of her clothes, she returned, in August 1811, to Tong Castle to lie in. From that time, till 1817, she continued to live with her husband at Tong, when he, without any just cause, quarrelled with her—insisted on her leaving his house, which she was obliged to do, and to go to her father's, where she has ever since resided, and has never cohabited with her husband since April 1817.

This is the substance of the libel, and, on account of what passed in the argument, it is necessary to consider the effect of these, her own averments. Upon this statement, if proved, she is undoubtedly entitled to the separation prayed; for though she had forgiven the earlier adultery upon condition and assurance of future amendment, yet, if he again committed adultery, even that previous injury would, in point of law, revive. Here is no appearance of being indifferent to her injuries, so as to give her husband a licence for his profligate course of life; but she resents them; she withdraws from his society; she only returns on condition of amendment: and when she a second time consents to be reconciled, she takes the best course to reclaim him, by insisting on quitting their residence, and on going to live at a distance: she refuses to accompany her husband back to Tong Castle; but being pregnant and in distress she is obliged at length to return. Unless, then, there was a knowledge of the adultery after the latter end of 1810, and during their subsequent cohabitation, no condonation can be inferred so far as the libel itself lays the case.

Against this charge, so made, what is the defence set up? In plea, none: the husband has given no allegation whatever; but he has administered very long interrogatories. In these interrogatories various grounds of defence are suggested, but he has not ventured to plead any thing responsive; here is no allegation contradicting and denying the charges of adultery—no allegation pleading condonation later than 1810, or knowledge of his subsequent adultery—no allegation exceptive to the

general character of a single witness—no allegation recriminatory against the wife, though he compelled her to quit his house.

It is said that a defensive allegation was not given, because the charges of adultery were pleaded so indefinitely, that they could not be counterpleaded: but that is not so. The adultery with Bradbury and Cliffe was to be proved, not by acts seen, but by their pregnancy, and by Durant's acknowledgment of the children: it was not necessary, therefore, to lay particular acts—besides that, adultery is admitted, and a different defence is set up; viz. condonation, not innocence. But the adultery with Dyke, James, and Starkey is specifically pleaded: that with Dyke among the trees near the avenue in the month of June; and of that with the other two, the time and place are both fixed: yet no contradiction by plea is tendered. It is said, "these charges are not proved, because the witnesses are discredited;" but though all the witnesses were well known, dependents at Tong Castle, yet no exception is offered against their character, but Mr. Durant is content with administering interrogatories and cross-examining one against the other, and is not wholly clear of an attempt to tamper with them.

The same observation applies as to the condonation; though he admits the adultery with Bradbury and Cliffe, yet there is no allegation to state Mrs. Durant ever knew that Bradbury had this third child; but he has made an attempt to prove it by interrogatories alone. So also, with respect to the imputation on account of which he excluded Mrs. Durant from his society, some interrogatories have been addressed to the witnesses, but there is no averment in plea. Now, though he was at liberty to cross-examine to all these points, and evidence thus got out would be admissible, and might be material in aid of what he might plead and examine to; yet the effect is very different, if what is thus extracted be relied upon as the sole ground of defence, because it places the other party under very unfair disadvantages, and might defeat justice. If, for example, he had contradicted the adultery in plea, Mrs. Durant might have adduced other circumstances to corroborate her former charge: if he had attacked the character of her witnesses, she might have supported their character, or have produced other witnesses to confirm and prove the facts: if he had alleged knowledge of the adultery yet that she forgave it, she might have given a responsive allegation to prove her total ignorance: if he had made any charge of misconduct, she might have repelled and shown it to be utterly groundless and malicious.

In proceeding then to examine the evidence and proofs, I am bound not to lose sight of these considerations, nor to take insulated and detached charges: but the whole together; for one part may throw an important light on the probability and credibility of other parts.

That Durant carried on a criminal intercourse with Bradbury and Cliffe is not attempted to be denied. It is admitted he had three children by Bradbury, and one by Cliffe: it was prudent on his part so to wrap up this series of misconduct in one general admission; but the Court is bound to look at the character of these adulterous connections. He had been married about eight years, had nearly as many children, and his family was further increasing; Bradbury was about sixteen, his nursery maid, attending on his children, and on that account it is probable she was decent and modest. This young girl, in this situation, does this husband and father of daughters seduce and debauch. Bradbury has been examined, and Mr. Durant's counsel have relied upon

parts of her evidence. She entered his service about May 1807, and staid in the family about eight months, when she went away pregnant. Her account of the commencement and particulars of their criminal intimacy is:

“That when she had been some months in the service, being one day in a room on the ground floor, adjoining the stables, which was unfurnished, Durant came therein, and pulled her about: whether he had connection with her at that time she does not recollect, but several times, when she was in the back premises, as the brewhouse, laundry, and other apartments, and no other person was observed to be about the same, he prevailed on the deponent to have connection with him; at Christmas she was discharged—went first to the house of Cooper at Galey, and thence removed to Newport in Shropshire to lie in.”

This, then, is the mode in which this father of a family seduces this poor girl—the attendant upon his own children—almost a child herself; and these are the sort of places in which he carries on his criminal intercourse—in a brewhouse, laundry, or unfurnished apartment adjoining the stables—watching when the other servants were out of the way. I agree with what was said in argument, that this wholly takes off the improbability that he was connected with his dairy-maid in the fowl-yard or shrubbery; or with labourer’s wives on the floors of their own cottages.

After her confinement at Newport, Bradbury was brought back to the neighbourhood of Tong Castle—to “the house in the wood,” inhabited by Doran, and there Durant kept and visited her, and she again became pregnant: she was then sent away to a place at or near Wolverhampton, and in March, 1810, she had a second child—about a year after the other. After the birth of the second child, Bradbury returned to her former residence at Doran’s—“the house in the wood”—where she remained about three months. There Durant again kept her, and she again became pregnant: she then removed to Oker, near Wolverhampton, and was there delivered of a third child in December, 1811.

It might seem that this profligate adultery hardly admitted of aggravation, but it is aggravated. Between the birth of Bradbury’s first and second child, when she went away to lie in, he formed a connection with her successor; the then nursery-maid, Elizabeth Cliffe: she also became pregnant, and she was brought to bed of a male child in June, 1809. Durant carried on this intercourse in his own house, almost in the room with his children: he was discovered one evening on a bed with this girl, in one of the spare rooms opposite the nursery, without the door even being locked—and so barefaced was his conduct towards his servants (for Mrs. Durant was then absent), that the nurse, Boycott, in the presence of Rider, the witness, reproached him, telling him that “he is always after her,” and pulled him away from the bed and from Cliffe.—Conduct more immoral, more degrading, and more disgraceful—making a brothel of his own house with the attendant upon, and in the apartment adjoining that of, his children, scarcely disguising his guilt from his servants—can hardly be imagined.

The fact of these adulteries is fully established: the defence set up is condonation. I proceed then to consider the proof of the condonation, not deciding the question, whether it can be set up as a bar without being pleaded, unless so far as it is admitted by Mrs. Durant’s case.

Mrs. Durant, in her libel, states, that after having returned in consequence of Durant's contrite letter in 1808; yet upon discovering the renewal of the adultery with Cliffe, she again, in 1810, withdrew to her father's house at Seighford, where she remained a month; but having had an interview with her husband there, she admits that she agreed to cohabit with him upon condition of his quitting Tong, and going into Devonshire: they went into Devonshire, and she never again returned to Tong till 1811, as already stated.

Here then is an admission of condonation after the second adultery with Bradbury, and after that with Cliffe: it is not, however, a condonation evincing an unfeeling disregard of her rights, and insensibility to the injury; she deeply feels her wrongs; she duly resents them, and she properly takes the most prudent means of reclaiming her husband. Even her return in 1811 was under circumstances which almost amounted to compulsion and necessity: here also is an admission of subsequent cohabitation, but here is no admission of a knowledge of the fresh adultery with Bradbury.

To establish condonation of that third adultery, and thereby to bar her of her remedy, there must be proof that she was aware of her husband's renewed misconduct; for the mere fact of subsequent cohabitation does not imply forgiveness, nor operate as a bar, unless knowledge of the adultery be shown. I know not of any case where condonation has been held to estop a party when it has not been pleaded. It may not be necessary to decide whether, if there were clear indisputable evidence of a condonation, it might, or might not, operate as a bar even against a wife without being pleaded or directly admitted: but all the authorities show that it is not so readily presumed as a bar against the wife as against the husband. All lay down (and the common feelings of mankind confirm them) that it is the very reverse; that the injury is different; that the forgiveness on the part of the wife, especially with a large family, in the hopes of reclaiming her husband, is meritorious; while a similar forgiveness on the part of the husband would be degrading and dishonourable. Without, therefore, advancing, as a clear rule, that condonation to deprive a wife of redress must actually be pleaded; yet I may venture to say, that, in order to be a bar, it must be clearly and distinctly proved. Knowledge and forgiveness are not legally to be presumed.

How then stands the proof of this condonation? In the first place, Mrs. Durant was not at Tong during any part of this third adulterous intercourse with Bradbury: she was either in Devonshire, at Bath, or in London: for the child was born in December, 1811. Bradbury was at the house in the wood only three months, so that she was in the neighbourhood of Tong only during the spring of 1811, and long before Mrs. Durant's return in August, 1811, had been removed to many miles distant, where she afterwards resided, and continued to reside. Durant was so cautious to keep the birth of this child from the knowledge of his wife, that he never afterwards would allow Bradbury to come into the neighbourhood; and Bradbury swears, and it is relied upon by Durant, "that she never had intercourse with and never spoke to him after the birth of this last child." Rider deposes, "that Bradbury wished to see Durant, but that he said it would be his ruin if he was seen talking to her." Rider by error states the time to be about 1816 or 1817, but it must have been considerably later. Doran, the wife, describes Bradbury as coming to the wood and wishing to see Durant much later, for

she says "she had left her house ten or twelve years before:" so does Doran, the husband; and the warrant against Bradbury is dated in 1820. So that there is no trace of Bradbury's having been in the neighbourhood of Tong after Mrs. Durant returned there in 1811, or of Mrs. Durant ever afterwards having seen her, before the final separation: and yet the whole relied upon to prove the most important fact—namely, Mrs. Durant's knowledge of this subsequent adultery—is a single passage in Bradbury's evidence, when in answer to the sixty-ninth interrogatory she says: "that Mrs. Durant did upbraid her with the birth of the children mentioned in her deposition in chief:" not stating when, where, nor in what terms. In her deposition in chief she has mentioned having had three children, and it is assumed that Mrs. Durant must have referred to all three, and must have upbraided Bradbury for having had all those children by Durant, and that this took place before the separation. This alone is to prove Mrs. Durant's knowledge of the third adultery, and to prove, without pleading it and against every probability, that Mrs. Durant ever saw Bradbury after her return to Tong in 1811, before the final separation; for if this happened after, it would be no condonation. If I was obliged to decide the case on this point alone, I should be strongly disposed to hold, that there was not that proof of a knowledge of the subsequent adultery upon which condonation could be bottomed as a bar to the relief sought by the wife from as profligate and degrading an injury, of the nature complained of, as could well be brought before any tribunal.

But the case does not rest on this point alone. Here are subsequent adulteries charged, to which it is not suggested that condonation applies: and if either of these subsequent adulteries be proved, it is clear that the earlier adultery revives and forms an aggregate upon which relief must be granted to the injured wife.

The parties continued, as has been already stated, to cohabit till April 1817. The next adultery is laid in the seventh article of the libel to have been committed with Mary Dyke, and on that article two witnesses have been examined—Jane Rider and Esther Hampton. Their own evidence is to this effect: "Jane Rider was born on Mr. Durant's estate—she and her husband (who was a tailor, and to whose evidence I have referred) were employed by; and rented two cows of, Durant; these cows used to come with Durant's to be milked near the fowl-yard. Mary Dyke was the dairy-maid; she was a neighbour's daughter whom the deponent had known from her childhood; one day the deponent was told by Durant's upper servant not to milk her cows by the fowl-yard, but at another spot near an elm tree in the park; a day or two after she saw Dyke for the first time fetching the cows out of the park; a thought struck her to go and see what was going on at the fowl-yard: looking through a hole in the wall she was much surprised to see Dyke standing against the wall with her face to her and Durant very near with his back towards her, the witness;—they were quite alone—the witness was frightened, and came away directly—and went again to the elm tree." Such is Jane Rider's evidence.

Esther Hampton was the cook at Tong Castle: "she often saw Durant behaving in a familiar way and toying with Dyke, throwing his arms round her neck when they were alone in the dairy. One day, a few days before she left the service, which was on the 8th of July, about three o'clock—the usual dinner-time—she had dished up dinner: the

servant said 'his master was not at home;' she said 'she would find him'—having a few minutes before seen her master pass the window, and a short time before that having seen Dyke at some distance, each going in a direction to meet at a particular point; she went to an avenue at the back of the castle, where she suspected she would find them together; she did find them in the act of adultery;" which she describes.

If these witnesses are believed, here is adultery proved. In considering the probability of the story and the credit of the witnesses, I must take the whole case together; and then, looking at the connection with the two nursery maids, is this account of his adultery with the dairy-maid improbable? Not in the least. Remembering the order for Rider to milk her cows in a different place—this order conveyed by the upper servant, who afterwards fathers Dyke's child, and who might be a very convenient person to Mr. Durant on this and other occasions for various purposes—has any person much doubt what was the object of Durant's meeting Dyke in the fowl-yard? though, if that were the only circumstance, it might not be sufficient proof of adultery being then and there committed. But let us look at the rest of the history.

It was argued that the time and place spoken to by Hampton are improbable. As to the time; not calculating it perhaps very nicely, he would select it, supposing that the servants were engaged in preparing for dinner, for with Bradbury in the laundry and brewhouse he watched his opportunity when the servants were out of the way: as to the place; on other occasions he was not very choice—among the trees in a summer's day with the dairy-maid is not more improbable than in out-of-doors' offices with the nursery-maid: as to the credit of the witnesses; Durant, though well knowing them, has not ventured to except against their general character: Hampton has had a child; but, with the example of Durant to countenance her, that is no great discredit at Tong Castle—chastity was not there, with such a pattern as the master and head of the family afforded, a virtue much to be expected or in high estimation; and the fact of Dyke's having had a child, which was laid to this convenient upper servant, does not go far to show that the master had no criminal intercourse, whoever might be the actual father. After, then, considering fully all the observations made by counsel, I find it very difficult to withhold my belief and conviction of the truth of this individual charge. If this be so, it becomes unnecessary to enter into much detail of the other two charges with the two labourers' wives in their respective cottages, for of this adultery with Dyke there is no attempt to allege condonation, and the former adulteries therefore would be revived.

The three Blakemores do certainly not stand high in point of credit, but their characters have not been fairly attacked and put in issue by plea: had that been done, they either might have been supported, or the accusations themselves might have been corroborated by other witnesses. The improbability of the conversation between James and the female Blakemore is not very great, considering the lax morals of the neighbourhood, considering that James herself had a child before marriage, and the sort of vanity which she, being of loose character and habits, might feel in being so noticed by the Squire of Tong Castle: she might think it matter rather of boast than of concealment and shame. As to the place, again—the floor of the cottage—Mr. Durant might be as well satisfied with that, as with the floor of the brewhouse or laundry.

The circumstance that makes the most impression on my mind, as

affecting the truth of these charges, is, that Blakemore should upon both occasions happen to come into the cottage just at the exact time: such a coincidence may possibly have happened, but it raises considerable doubt as to the reality of a story, coming from witnesses not wholly unshaken in credit. If this were the only proof of adultery; if there were no other charges established; if, up to this time, Durant's conduct had been unimpeached as a father and a husband, I should not have ventured to pronounce a sentence on the evidence of the Blakemores; but the whole history standing as it does, makes it scarcely necessary to place much weight, or to come to any decisive opinion, upon these two charges; they may or they may not be true; but being spoken to by such witnesses and of such a person, I should be more disposed to say "not proven" than "not guilty;" for I am far from being satisfied that it is fabricated, still less that it is suborned evidence. If Blakemore has been to Seighford, he has also been to Tong Castle, for his account on the thirty-sixth interrogatory, of the agents of Durant, and of Durant himself having him, together with Starkey, up to Tong Castle, though not adding to the credit of the witness, does not exhibit conduct quite proper in the party against whom he was about to be produced as a material witness. The influence, which Durant must have over the class of witnesses, who alone could be the persons capable of proving the adultery charged, renders their evidence not the less credible. It is true that Mrs. Durant did not separate herself on the ground of his adultery: she was not aware of the extent of it; and this brings me to the account of the separation and subsequent history.

In the latter end of April, 1817, Mrs. Durant being at Seighford with her father, who was ill, and her sister, Miss Eld, and another lady being at Tong Castle, Durant charged his wife with impropriety of conduct with the tutor of his children. Mrs. Durant on hearing it immediately returned to Tong Castle, accompanied by her two brothers; and Mr. Slaney, a friend of Durant's, being called in, the matter was investigated, and Durant declared himself perfectly satisfied; but the tutor left the family. Notwithstanding this, Durant in a few days afterwards ordered his doors to be shut against his wife, stated to Slaney that he had proofs of her criminality, and desired she would attend at Slaney's house, not at Tong Castle, to exculpate herself: she indignantly declined, and by Durant's orders his doors continued to be shut against her. He has ever since persisted in the same insinuations, inquiring in his interrogatories, whether she has not kept up an intercourse with this tutor and supplied him with money; and even at the hearing has instructed his counsel to persevere in the same species of suggestions; but he has never brought forward the charge in any specific and tangible shape, and the Court is bound in common justice to consider it as perfectly groundless, and to say in the words of Lord Stowell, in the case of *Soilleux v. Soilleux*, 1 Consistory Reports, 278, when observing on similar conduct on the part of the husband, "This is a continuation of the atrocious conduct which has marked the character of this man throughout." The terms are not inapplicable on the present occasion.

Upon these events in 1817 the wife did not immediately resort to the present suit. A deed had been executed by Durant in 1809, by which he bound himself to allow his wife 500*l.* a year in case she should at any time choose to live separate, and to support one of the children. An action was brought in the name of the trustee upon this deed to recover

the allowance: in the first instance a verdict was obtained, but upon a writ of error the decision was reversed; *Titley v. Durant*, 7 Price 577; she then resorted to the present suit. The proceeding under that deed was no legal bar to this suit, nor does it appear to bear unfavourably upon the case of the wife. After this charge, after an exclusion from his house and his society, could she wish to return degraded and insulted to her twelve children and her servants? Her object could alone be to procure a subsistence in a state of separation, either under the deed or by the present suit: there was no other alternative; and if that object could at once be obtained under the deed it was natural and not improper that she should try that method, rather than proclaim the misconduct of the father of her children by a detailed disclosure of it in such a proceeding as the present. It is no bar to the suit; it is no acquiescence in her injuries—it was rather meritorious to abstain from the exposure of her husband's domestic profligacy, till driven to it by necessity as her only remaining remedy.

In the course of the argument the Court threw out whether if the condonation took off the effect of the admitted adultery, and the subsequent adultery were not proved, this groundless charge against the wife and shutting his doors against her, would not do away the effect of the condonation and revive her title to legal relief: it may perhaps be unnecessary to decide upon the point, as I am satisfied that adultery subsequent to the established condonation is proved; but it may not be fitting wholly to pass by this point.

Some propositions seem to be admitted:

First, that condonation is accompanied with an implied condition.

Secondly, that the condition implied is that the injury shall not be repeated.

Thirdly, that a repetition at least of the same injury, does away the condonation and revives the former injury.

So far the propositions are clear: but must the injury be of the same sort—be proved in the same clear manner—be sufficient *per se* to found a separation? If nothing but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. The only possible way in which the former adultery could bear would be in, possibly, inducing the Court to give some slight additional alimony: but it could not bear even in that way when the suit is brought by the husband; in which case, of course, there would be no question of permanent alimony. It appears, therefore, hardly to be consistent with common sense, that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar: something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery, but still it was maintained that it must be “an injury *ejusdem generis*.”

It is difficult to accede to the good sense even of that principle, or to suppose that the implied condition upon which the forgiveness takes place, could be, “You may treat me with every degree of insult and harshness—nay with actual cruelty, and I bar myself from all remedy for your profligate adultery—only do not again commit adultery or any thing tending to adultery:” the result of the argument is, that this must be supposed to be the condition implied when condonation of adultery takes place. The plainer reason and the good sense of the implied con-

dition is, that "you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law) 'with conjugal kindness'—on this condition I will overlook the past injuries you have done me."

This principle, however, does not rest wholly on its own apparent good sense, but the Court has authority to support it. It has been held that cruelty will revive adultery. The case of *Worsley v. Worsley*, (Vide *supra*, p. 311. and *infra*,) was read by the Court in the course of the argument, and the Court has no reason to doubt the correctness of the note. If this cause had turned upon that authority alone, I might have thought it necessary myself to look through the original papers, but knowing the accuracy of the quarter from which this note came, and still more, finding that case fully investigated, and the principle recognized by another very high authority, in the case of *D'Aguilar v. D'Aguilar*, I have contented myself with what I have already quoted respecting the decision of *Worsley*.

I advert to the case of *D'Aguilar* also for another purpose, viz. to set right a misconception, which seems to have arisen, that it was there laid down by my Lord Stowell that the reviving cruelty must be sufficient *per se* to be the ground of a sentence; and if that great Judge had solemnly laid down such a proposition I should have much diffidence and hesitation in dissenting. The passage, to which I am about to refer, is to be found in the Consistory Reports, a collection of most valuable judgments; but it is not in one of the cases reported in the body of the work; it is only stated in a note. The passage stands thus:

It is said, "that though condonation might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence: this is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore revive the ancient facts." *D'Aguilar v. D'Aguilar*, 1 Consistory Rep. 134. *notis*. This was merely on debating a plea, when dicta may be stated with less precision, and are more easily misapprehended, more especially as the point did not require decision, there being actual subsequent cruelty pleaded: but, upon looking at the sentence, I find that distinguished individual lays down a different doctrine, namely, that less will revive former acts than would found a sentence.

He says, "A question has been raised in argument, whether acts of adultery revive acts of cruelty? and a case has been cited in which it was decided by Dr. Henchman, who I always understood was one of the most judicious practitioners who ever presided here, that acts of cruelty revived acts of adultery before condoned. The case is *Worsley v. Worsley*. I have had it looked up. It never proceeded to sentence; but the allegation was admitted after an opposition. It alleges, that the parties were married in 1712; that the husband treated the wife with cruelty; that he committed adultery in 1720; and, in 1728, the parties were living together, for acts of cruelty are then stated. I presume, then, the objection taken was, that after 1720 they were living together, and the only ground on which the Court could admit the act of adultery was, that it was revived by the cruelty. The Court, however, overruled the objection. It has then been considered in this Court, that circumstances may take off the effect of condonation which would not support an original cause. Facts of cruelty revive adultery, though

they would not support an original suit for it. The condonation, in this case, is such, that it is hardly necessary to resort to the authority of Worsley, but it confirms the doctrine, that facts would revive which would not be a sufficient ground for an original proceeding. It is held that words of heat and passion, of incivility, or reproach, are not alone sufficient for an original cause; nor harshness of behaviour: but I cannot but think that their operation would be stronger in condonation. Words, otherwise of heat, receive a different interpretation if upon former occasions they have been accompanied with acts; if it is apparent that the party was in the habit of following up words with blows: and on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit." *D'Aguilar v. D'Aguilar*, Consistory, Mich. T. 1794. See a note of the judgment in this case, *post*.

Under these authorities I am inclined to hold: first, that cruelty will revive adultery: and secondly, that less is necessary to revive than to found an original sentence.

The same doctrine is maintained by the same eminent judge in *Popkin v. Popkin*.(a) "The principal objection raised, is, that a condona-

(a) POPKIN v. POPKIN.

*Consistory, 1794. Hil. Term, 2d Session.*

A libel pleading specific acts of adultery and cruelty can only be rejected *in toto* on one of two grounds; 1st, that the plea on the face of it shows a case impossible of proof.

2d, that it evidently appears from the facts pleaded that the party complaining has barred herself.

Mere time is no bar in the case of a woman.

The husband's attempts, when affected with venereal disease, to force his wife to his bed, is of a mixed nature, partly cruelty and partly evidence of adultery, and would remove condonation of either.

The wife's knowledge and forgiveness of adultery is matter of defence and to be proved.

Venereal disease long after marriage is *prima facie* evidence of adultery.

A conditional promise made under force and violence, is no condonation, if the condition is not fulfilled.

One act of cruelty of an inflamed nature and sufficiently gross to excite terror entitles the wife to relief.

It is not necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious to be patient as long as possible. Forbearance does not weaken her title to relief.

An husband's attempt to debauch his own women-servants is a strong act of cruelty.

In *Popkin v. Popkin*, the libel, after pleading the marriage in 1778, charged the husband with general intoxication; habitually frequenting brothels; associating with common prostitutes at Bethune and at Lisle; attempts to debauch his women-servants in his own house; an act of adultery "on an evening happening in 1787, or the beginning of 1788, with a young woman, the servant of a milliner at Lisle, and that he afterwards continued his improper intercourse with her, and confessed the same to Mr. Montgomery;" two specific violent acts of cruelty in January and June 1784; and general cruelty from April to August 1784; venereal disease in 1789; and up to December 1790, and his confessions; his attempts to sleep in the same bed with his wife, and, that on her refusal, he became violently enraged, made use of many outrageous and dreadful menaces to compel her, and, on one occasion, at Lisle, in September 1790, "he seized her in his arms, and forcibly dragged her along towards his bed; that she disengaged herself, and immediately ran down stairs, undressed, into a room where was a gentleman sitting, her husband's relation; that her husband followed her into the parlour, when she fell on her knees, intreated him to desist, promising to return to his bed as soon as he would satisfy her he was cured." The libel further charged similar conduct on several successive nights; and that in conse-

tion appears on the face of the libel. But it is not proved that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive adultery. It may be true that, under a citation for adultery, you might not originally plead facts of cruelty, nor *vice versa*; but I do not know

quence of such conduct, she, on the 6th of January 1791, while he was absent in England, quitted his house (which he had hitherto prevented) and had never lived or cohabited with him since August 1790.

*Dr. Arnold and Dr. Swabey*, in support of the libel.

*Dr. Nicholl and Dr. Lawrence*, contra.

*Per Curiam*.

SIR WILLIAM SCOTT (Lord Stowell.)

"This libel is offered in a suit for the adultery and cruelty of the husband. It is objected to *in toto*: but I can reject it *in toto* only on one of two grounds:— 1. That the story, on the face of it, shows a false case which cannot be proved. 2. That it evidently appears, from the facts pleaded, that the party complaining has barred herself.

"A plea cannot be rejected as false, unless it is manifest that it is impossible to prove it. Improbability is not sufficient: it must be shown it cannot be proved by any possibility. It is not here contended that proof is impossible, but that it is improbable. The delay is accounted for by facts suggested by themselves, viz. the absence of the husband out of the kingdom, and the derangement of his circumstances. This is sufficient of itself; but in fact there has been no delay; for the citation was taken out long before it could be served. But mere time is no bar in the case of a woman, as various reasons may induce her to submit. Mere flux of time is no condonation; neither on the face of the proceedings, nor on the libel, does it appear, that there is any impossibility of proof.

"The principal objection raised is, that a condonation appears on the face of the libel; but it is not proved, that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive adultery. It may be true, that, under a citation for adultery, you might not originally plead facts of cruelty, nor *vice versa*; but I do not know that it has been held the two are so slightly connected, that one will not revive the other. No such case has been cited nor do I know that such has been the doctrine of this Court: I have rather understood otherwise; and the case of *Worsley v. Worsley*, supra 311, quoted by *Dr. Swabey*, is an authority in point. It is not necessary to give a decided opinion here, as the fact of revival is of a mixed nature, partly cruelty, and partly evidence of adultery, and would revive either.

"It is said, the only specific act of adultery is charged in the 8th article, in the year 1787. It is not shown this was known to the wife: it might be secret; of course, then, she could not forgive it. It would be matter of defence to prove that she was acquainted with the fact, and forgave him. The 12th article states, that he was violently afflicted with venereal disease, and attempted to sleep with his wife, and thus communicate it to her. Whether this disease is evidence of adultery may depend upon circumstances, such as length of time since the marriage. If it shows itself soon after the marriage, it might be hard to say that it would be proof of adultery. Here the parties have been married twelve years; and though possibly it might be lying in the blood so long, yet this would be matter of defence, and to be proved. Under such circumstances it is *prima facie* evidence of adultery.

But it is said, "here is a condonation; for the wife promised she would return to his bed, when she was satisfied he was cured." This declaration, however, was made under force and violence, and to relieve herself from his attacks. The promise was merely conditional, and that condition was never fulfilled. The husband has a right to the person of his wife, but not if her health is endangered. It is impossible to say that this is such a condonation as will bar adultery charged on the husband.

"On the charge of cruelty, it is said that there are only two acts of cruelty in twelve years: if only one act, and that was of an inflamed nature, and was sufficiently gross to excite terror in the wife, she would not be barred. (See *Holden v. Holden*, 1 Consis. Rep. 458-9.) It does not follow there are not other intermediate acts, which the party might plead if necessary; but she would be advised only to

that it has been held the two are so slightly connected that one will not revive the other. (See *Barrett v. Barrett, supra*, 16.) No such case has been cited: nor do I know that such has been the doctrine of this Court. I have rather understood otherwise; and the case of *Worsley v. Worsley*, quoted by Dr. Swabey, is an authority in point. It is not necessary to give a decided opinion here, as the fact of revival is of a mixed nature, partly cruelty and partly evidence of adultery, and would revive either."

To apply the principle to this case. Here is not cruelty which would support a sentence "*propter sævitiam*;" but here is an act which might be pleaded as such in conjunction with other circumstances. If a person who had ill-treated his wife, and had been guilty of acts of violence and words of menace, had finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty. By some authorities in the civil law, this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect which it is unnecessary again to state. These Courts and the law of this country have not gone the length of recognizing it as a substantive ground; but it is a fact, among others, "*per quod consortium amittitur*." Making this charge, and excluding her from his residence without provision, is a species of malicious desertion; but neither is malicious desertion by the law of England a ground of separation. (See *Forster v. Forster*, 1 Consistory Reports, 154.)

What however was the situation of this lady at that moment, and what does it now continue? Here is the wife and the mother turned out of doors in the face of her neighbours, her family, and her twelve children, under the heaviest of all imputations—a charge of criminality with her children's tutor. Is there any woman who would not have consi-

plead sufficient facts without loading her case with supernumerary circumstances.

"The acts of violence are not objected to; but it is said, she consented to live with him. It is not, however, necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious in her to submit to no inconsiderable degree of ill treatment; to be patient as long as possible. Such forbearance is not permitted to weaken her title to relief. But here, cruelty is carried down to the latest period of the cohabitation; the husband forcing his wife to his bed when he was violently affected with venereal disease. It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution. Here he attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, and attempted in the most improper and violent manner. It has been said, that he was unconscious of this malady: that is for him to show; though it is improbable at present that he should succeed in establishing his ignorance. I am clearly of opinion, that as this disease continued to December, she quitting cohabitation on the 6th of January, it brings the charge down sufficiently, revives former acts, and repels the suggestion of condonation. I overrule without hesitation the general grounds of objection."

In remarking upon the particular objections to the libel, the Court said:—"The attempt to debauch his own women servants was a strong act of cruelty; perhaps, not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct of which the wife had a right to complain."

Libel admitted.

dered an act of personal violence, inflicted in passion or even deliberately and maliciously, trivial and pardonable in comparison with this accusation? Who would not have considered an act of casual adultery, nay, the deliberate seduction of a nursery-maid, trivial—not really in itself, but as affecting the feelings of a wife—trivial, in comparison with this charge?—a charge made not in the haste and error of the moment, but kept up and persevered in to the present time? And yet this severest of all injuries is not to wipe away the former condonation; but that condonation is to bar the wife of a remedy on account of all the profligate adulteries previously committed. This is not treatment in conformity with the promises and conditions on which she forgave; promises not left to implication, but expressed in Durant's own letter:

“My dear Sir,

“I am again obliged to apply to you in my distress; I am the most wretched man alive; my poor dear Marianne has behaved like an angel, but it is impossible she can ever forgive me. On Friday last she heard of the brutal passion which had hurried me on to commit what I shall repent of to my last hour. One of the women confessed to her that I had been criminally connected with her. As I might have expected, she insisted on leaving the house instantly, and the carriage took her on the road to London: but as I could never bear the idea of parting with her, I followed it on horseback, and she most indulgently consented to return. I cannot object to the present determination of being some time at Seighford, as I hope she will there recover the tranquillity I have so miserably destroyed: would she but once consent to return here I would relinquish every thing in the world to her guidance, and if I ever prove ungrateful for her kindness would willingly live on bread and water to give her possession of all my property. Your kindness will, I am assured, send me an answer by my servant, and I hope bring her leave to come to Seighford to fetch her home. I trust nothing will induce you to let her leave Seighford, as I know she would rather suffer any poverty than let her family know where she retired to, and in her present disposition I fear she might make away with herself.”

Such are the promises on which she returns: these he breaks by repeated subsequent adulteries, and consummates his unworthy treatment by these cruel accusations. If the case turned upon this point, I cannot say how I might feel compelled to decide: but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision.

And what is the present situation of this lady according to the husband's prayer to be dismissed? His counsel say, her remedy is a suit of restitution. Does then the husband pray, that he may be compelled to take home and to treat with conjugal kindness the wife whom he has for years been charging as criminal? that he shall take back to the society and to the management of his children the mother whom he has so branded and degraded by his imputations? Is this wife, who has suffered the grossest injuries, in point of law, from the profligate adulteries of her husband, and the still more distressing insults, in point of feeling, from his groundless charges, to ask the assistance of the law to compel him to take her home to be held up by him as an object of scorn and aversion to her own children? Is this the “*consortium vitæ*,” which she can alone seek? The Court cannot but feel relieved that its

duty does not drive it to place her in this miserable and humiliating condition.

On the grounds already stated, that her knowledge of the last adultery with Bradbury is not proved, and that the husband's adultery with Dyke is proved; and without deciding on any of these other points, I think I am warranted in pronouncing the wife entitled to the sentence of separation which she prays.

### LADY D'AGUILAR v. BARON D'AGUILAR.—p. 773

The husband's conduct is legal cruelty, if by cohabitation the wife is exposed to bodily hazard and intolerable hardship. On proof of such conduct and the husband's adultery with three different women, a sentence of separation *à mensa et thoro* pronounced at the wife's prayer, and the husband condemned in her costs.

All persons, (*ex. gr.* Jews) who stand in the relation of husband and wife in any way that the law allows have a claim to relief on the violation of any matrimonial duty.

In a suit for divorce by reason of the husband's adultery and cruelty, the Court will not inquire into his depriving the wife of her separate property, *aliter* as to her paraphernalia.

The husband taking to a separate bed is not pleadable as cruelty.

Words of abuse and reproach are not, but words of menace intimating a malignant intention of doing bodily harm and affecting the security of life are, legal cruelty. The Court must not wait till threats are carried into execution, but must interpose when words raise a reasonable apprehension of violence and excite such terror as make life intolerable.

Minute acts should not be pleaded, but properly come out in evidence.

Spitting on the wife is a gross act of cruelty.

Obtaining the wife's separate property by imposition cannot, but compelling her by threats to go any where may, be pleaded as cruelty.

If words of menace raise a reasonable apprehension, it matters not whether they be addressed to the wife or to a third person.

When the charge is of keeping certain specified houses to which he took divers loose women, specification of place is sufficient without specification of time.

A long adulterous intercourse and cohabitation, the birth, maintenance, and acknowledgment of a child are pleadable if there is nothing that necessarily affects the wife with the knowledge thereof.

The remoteness of facts deposed to accounts for the witnesses relating them with less precision and distinctness. All that the Court can require is to be satisfied that the evidence is substantially true.

A wife's delay in applying to the Ecclesiastical Court for redress from cruelty does not infer that there is no ground for complaint, nor even raise a presumption against the truth of the charge.

An intermediate separation so approximates two periods of cohabitation that acts of cruelty, happening before the separation, are to be looked upon as if they had happened recently.

The mode in which after a separation a return to cohabitation was effected is material to show whether there was or was not condonation.

All condonations by operations of law are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct.

Circumstances may take off the effect of condonation which would not support an original cause.

The wife's unwilling acquiescence in a return to live in the same house, but without connubial cohabitation, does not amount to a complete forgiveness.

To domestic conduct friends, dependants, and servants can alone speak; they must have some bias, and the Court must receive their evidence with some drawbacks.

Cruelty may be relative, and depend on the age, habits, &c. of the party.

The husband's rights that may legally be insisted on by the due exercise of marital authority must not be enforced by indignity, brutal violence, nor by threats.

If a wife proceeding against her husband for cruelty and adultery was not originally justified in withdrawing from cohabitation, the Court must pronounce her under the obligation to return.

If the Mosaic law as at present received, allows concubines, such a privilege could not be noticed without being specially pleaded. *Quære*, whether it could be noticed at all in the Courts of this country.

Conjugal cohabitation after an act of adultery avowed by the husband to the wife, may be condonation; but if a wife overlooks one act of human infirmity, it is not a legal consequence that she pardons all other acts.

Condonation is not held so strictly against a wife as against a husband.

In general the husband is bound to defray the wife's costs, and also to provide alimony *pendente lite*; but when the wife has separate means, which the Court deems sufficient for her defence and subsistence, she is not entitled to alimony nor costs during suit; she then stands on the common footing of a litigant party; and on proving her case has a *prima facie* right to costs. It is however discretionary with Courts on a consideration of all the circumstances to relax the rule.

*Dr. Nicholl* and *Dr. Swabey* for Lady D'Aguilar.

*Dr. Arnold* and *Dr. Laurence* contra.

JUDGMENT.

SIR WILLIAM SCOTT (Lord Stowell).

THIS is a cause of separation for cruelty and adultery brought by the wife against the husband. The marriage took place, in March, 1767, according to the rites of the Jewish nation, both parties being Jews. The Court does not remember any proceeding between such parties in a case of this nature: there may have been such, but whether there have been or not, there is no doubt that the suit may be entertained. (a) The marriages of Jews are expressly protected by the marriage act; (b) and persons of that persuasion are as much entitled to the justice of the country as any others; for I take the doctrine to be, that all persons, who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have claim to relief on the violation of any matrimonial duty. Jews, in this country, have the same rights of succession to property, and of administration, as other subjects; and they come to the Ecclesiastical Court in order to have such rights secured. Many of them are possessed of considerable personal property; and they have the same right to transmit it as others. It would be hard, then, if they had not the same mode of securing the legitimacy of their children, and consequently if the same rights of divorce did not belong to them. I have therefore no doubt that it is the duty of the Court to entertain such a suit between Jews, as between others of a different persuasion.

The case comes before me simply upon the evidence on the libel: nothing has been pleaded by the husband in contradiction or explanation. On the admission of the libel, the Court directed the part relating to the property to be reformed, thinking that it might embarrass the

(a) See the cases of *Lindo v. Belisario*, 1 Consistory Rep. 216., and Appendix, p. 7.; and *Goldsmid v. Bromer*; 1 Consistory Rep. 324.

(b) 26 Geo. 2. c. 26. Marriages of Jews are also excepted out of the operation of the marriage act now in force, viz. 4 Geo. 4. c. 76. s. 31. For an account of the legal state of the Jews in this country, see the Addenda to Jacob's edition of *Roper's Husband and Wife*, Vol. 2, p. 476. and the references given.

Court by leading to an inquiry into matters impertinent, and not within its cognizance. (a) Other parts were ordered to be struck out as too

(a) The eighth article of the libel, in substance, pleaded, "that in April 1773, when the wife withdrew from cohabitation, she was possessed of jewels, and had in her own house jewels, plate, household furniture and other effects, to the value of 8000*l.* all which were her own sole and separate property; that the husband entered upon the premises and possessed himself of all the said effects, her wearing apparel, and ornaments of her person, except the clothes she had on." On this article the Court said—"It has been objected that this will lead to a discussion upon which the Court may find it difficult to satisfy itself: the husband *prima facie* is entitled to the property of the wife: it is only by stipulation that it can be taken from him, and it is discretionary what part shall be communicated to the wife. The Court would be under great difficulty in interposing in such an inquiry: the consequence of admitting this article would be an averment in justification of the husband, that it was not the separate property of the wife. The husband has a large discretion over joint property. How is the Court to discriminate and determine on such matters? This part of the article would lead, I think, to an inconvenient inquiry: I shall therefore limit the article to pleading, that he deprived her of her wearing apparel, together with the ornaments of her person. A wife has always a right to have her clothes; the law shows a special indulgence to a wife's rights in her paraphernalia and ornaments.

The only part of the ninth article objected to, is that which pleads, "that the husband lay in a separate bed." This should not be pleaded as an act of cruelty; it would be too much for the court to declare it cruelty.

The tenth article pleads, "that he abused her very much, cursed and swore at her bitterly, called her whore, and other opprobrious names; that he held his clenched fists to her face, and declared, that he would do for her; that he would be the death of her." It is said, these are mere words; but these are acts amounting to an assault at common law, for which he would be bound over to keep the peace. Words of abuse and of reproach create only resentment, and are not legal cruelty; but words of menace, intimating a malignant intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The Court is not to wait till the threats are carried into execution; but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable. If rendering life intolerable be the true criterion of cruelty, what can have that effect more than continual terror, and the constant apprehension of bodily injury? It may be shown that these were mere words of heat; but *prima facie*, it is to be understood, that a man means what he says. Until I am instructed by superior authority, I shall hold that the Court is obliged to interpose where words of menace are used. I should feel my responsibility sit uneasy upon me, if in consequence of rejecting a plea charging such an act, harm should happen. But, to interpret such words, the party has a right to refer back to violence formerly used.

The article proceeds to state minute acts: I think they may better be stated in a general way; they throw a levity on the business, when pleaded, and are more proper to come from the witnesses. As to spitting on her, nothing can be more gross cruelty, and there is a case in Hetley in which a prohibition was denied, the only act of cruelty pleaded being spitting on the face; and that was adjudged sufficient. (a)

The 11th pleads, "that by imposition and threats he compelled her to execute a deed of assignment of 3560*l.* South Sea stock." Here is a general averment, that this was not only obtained by threats, but by imposition also. I cannot, consistently with general principles, admit this as cruelty: it would be improper to inquire into this transaction, if the parties did not resort to Courts which can invalidate the act. I, therefore, reject this part of the article. The latter part, which pleads "the mode of compelling her to attend at the office of the Accountant General, by threats, and by holding up his clenched fists," I shall admit; but I shall not inquire into that part which states, "that the object of going there was to receive her separate property; and that he snatched the draft, received from

(a) See Cloburn's case, Hetley, 149.

minute and particular, not because I thought that debarring the wife of her fair indulgencies was irrelevant, but because facts, when too minutely pleaded, carry a ridiculous appearance. To consider then what appears in evidence.

Mr. Pereira, the executor of the first husband of the wife, is a witness to whom there is no objection. His account of the manner of their cohabitation gives a striking picture of habitual harshness and incivility. "He observed, that in the first week after their marriage, he treated her with great harshness; spoke in a loud imperious tone; his manner was so disgusting, that witness ceased to visit them; his manner was contemptuous; it brought tears into her eyes." Mrs. Kahlen confirms this account. It is true that in 1770 this witness was very young; and it is a long time ago: and much observation has been made on her minute testimony; but, looking at the facts to which she deposes, I think it not improbable that they may have made that exact and lasting impression to which she swears. It is truly said, that her evidence as to a fact which occurred when she was nine years old would be received with caution even at the moment. But all the Court has to consider is, whether the witness gives an account on which it can judicially depend. Her account of his general treatment is: "she was often at the house; he treated his wife so cruelly as, at that time, to impress her mind with the idea that he was an illnatured man; he treated her in the harshest manner. 'Bitch,' and 'damnation seize your blood,' were frequent expressions. She at length avoided going." These two witnesses together describe such general ill-treatment and behaviour, as to be highly

the Accountant General, from her hand, and kept it for his own use, against her will."

The 12th pleads, "that she had gone out on a visit with the sister and nieces of the Baron; that on his return home he became enraged, swore he would play hell with her, and do for her: servants were alarmed, and went out and told her; she did not return." It appears to me, that if words of serious menace, importing bodily harm, be legal cruelty, it does not differ much whether they be addressed to the person herself or to a third person: the test is, if they raise reasonable apprehension; indeed they carry with them something of additional strength, if they raise apprehension in others, for that shows the wife was not alarmed upon any unreasonable grounds.

The 13th pleads, "that this cruelty affected her health, and "that she still remains in an impaired and weak state of health."

To the 14th, the objection taken is, to the want of specification in point of time. It is alleged, "that he kept certain specified houses, to which he took divers women, from 1790 to 1793." The want of specification, as to time is supplied by the specification as to places. These are pointed out; the scene of guilt is specified; he will have the opportunity of calling servants to show, that he did not habitually carry home these loose women to these places; he will not be unprovided with defence.

The 15th pleads "an adulterous intercourse for the last fourteen years with Susannah Lewen; and the birth of a child thirteen years ago, maintained and brought up by the Baron, and lately acknowledged by him."

The 16th, "that Lewen lived at a small house in the City Road, belonging to the Baron, till seven or eight years ago; that he then took her to reside in his own house, in Broad Street Buildings, where she has ever since resided as housekeeper; that during the years 1790, 1791, 1792, and 1793, Baron D'Aguilar and Susannah Lewen have slept in the same bed; but the same was not made known to his wife till after the commencement of this suit." There is nothing that necessarily affects the wife with the knowledge of the fact; she has pleaded the contrary; and that his acknowledgment of the child was lately made.

The 17th, 18th, and 19th plead further adultery with other women. Libel admitted, as reformed.

improper, and which amount to a great degree of harshness; though, perhaps, not alone sufficient for the Court to take hold of.

But there are two facts on which the Court is bound to interpose. Mrs. Kahlen says, "that one day, at dinner, D'Aguilar quarrelled with the servant; was then sulky; then flew into a passion with his wife without provocation; and pushing the deponent aside, he threw the fire-screen with violence at his wife, saying, 'Damnation seize your blood.' Deponent believes it would probably have killed, if it had struck her: she was alarmed and ran to her aunt's house." The fire-screen then was thrown with an intention to strike, and with a violence which would have endangered the person. It is said, that no other witnesses have been examined: but it does not appear that any were spectators, or if spectators, that they are alive. This, therefore, is an act which the law considers direct cruelty, and I see no improbability that it should make an indelible impression on the mind and memory of a child; and the account corresponds with the husband's character.

Another fact is spoken to by Pereira and Linneard. The former says; "in December, 1772, Lady D'Aguilar came to his co-executor; complained that her husband had beaten her; she showed her arm; it was bruised; he advised her to swear the peace against him, which she did; and bail was given." Linneard deposes, "At the end of 1772, or in the beginning of 1773, she came to her aunt complaining her husband had beaten her; her arm was bruised from the shoulder to the elbow, and black as if mortified. She continued ill a considerable time." I am at least satisfied that articles of peace were exhibited against him, and that bail was given.

It is said these facts are remote: they are so; but the Court is to consider that as a fair reason why the witnesses relate them with less precision and distinctness. If I am satisfied the evidence is substantially true, that is all I can require. Again, it is objected that there is no evidence but the declarations of the party herself, and that there might be other cause for her bruises; but these declarations are supported by the appearance of the body, and by her act in going to the magistrates. The conduct of the husband likewise confirms this representation; for he might have made a defence before the magistrates, and might have given an allegation in this Court, showing that the bruises were the effect of another cause; but no such explanation has been offered. From the conduct of both I think I am well founded in drawing the inference, that this act did happen as she described at the time. This fact, then, was such gross violence as would entitle the wife to that security which this Court can give.

But it is objected, that as no application was made to the Ecclesiastical Court, the inference is there was no ground for complaint. The subsequent history proves that she would have consulted her own interest better, if she had resorted here; but it has never been held that a woman's not coming raises even a presumption against the truth of such an occurrence; there may be many reasons against such a course; and here the conduct of this lady is accounted for by the voluntary separation being acquiesced in.

A very indistinct account is given of a subsequent cohabitation for a short time; but there is sufficient to satisfy me that they did again shortly separate; and a witness proves that this lady was then in ill health, destitute of clothes, and, he believes, that the reason of their separation was

the husband's ill-treatment. The separation lasted for nearly twenty years; and this has at least one effect, viz. that it approximates the two periods of cohabitation. If they had lived together, the Court would have considered the former acts as pretty much obsolete, and that the husband was *emendatus moribus*; but as there was a separation it is to be considered as if the intermediate years had not elapsed; and the Court has a right to look at former acts as if they had happened recently.

It is material to observe how the return to cohabitation was brought about, as it will weigh whether there was a condonation, and what was the effect. In December 1792, the wife received some letters which agitated her: they signified an intention of the husband to return and live with her. Accordingly he came; and the wife is heard to say, "she could not live happily with him twenty-four years ago, and could not expect to do so now." It was not a voluntary return on her part, but it was his determination and his act: and the utmost consent shown on her part, was a passive acquiescence after considerable resistance. It is said that no charge of former ill conduct was then produced; but I think the extreme submission and resignation of this lady, which she appears, by the evidence, to have shown in the whole of their cohabitation, account for her not expressing herself more strongly than "that she could not live happily with him before." If this acquiescence is a condonation, still it is only conditional. She must have had promises that no ill-treatment should take place: indeed all condonations, by operation of law, are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional forgiveness.(a)

A question has been raised in argument, whether acts of adultery revive acts of cruelty? and a case has been cited in which it was decided by Dr. Henchman, who I always understood was one of the most judicious practitioners who ever presided here, that acts of cruelty revived acts of adultery before condoned. The case is *Worsley v. Worsley*. I have had it looked up. It never proceeded to sentence: but the

(a) "Condonation is merely retrospective; if the offence forgiven is afterwards renewed, the party has a right to revert to former facts; if she brings them in conjunction with later. . . ."

"The second consideration is whether there is any bar to this suit, as the wife would be entitled to relief if there is none: here it is said there is something of a condonation; that she suffered the visits of Lord Ferrers after a knowledge that he was cohabiting with another woman as his wife; that this was a sort of compromise. It has been truly said, that the doctrine of condonation is not exactly defined as to the time of its taking place; I know no case where it has been held, that the mere abstinence from bringing a suit would operate as a legal bar to a suit when brought; and many cases might be put where it would be very hard that it should: the wife may be poor, *inops consilii*: such a rule would be imposing a cruel necessity tending to deprive the party of a legal remedy. Abstracted from the letter there is nothing like condonation. By the evidence it appears that it was a marriage of continued uneasiness to her, that she remonstrated with and applied to him in every way without success: there is nothing like an offer of acquiescence; on the contrary there is honest indignation expressed as strongly as it could be without coming to the Court to complain. What is the import of the letter? 'That provided Lord Ferrers would return to his lawful bed, she (Lady Ferrers) would not reproach him more;' but to interpret it that if he would divide his pleasures she would be satisfied, is a construction I cannot put upon it: that letter could never amount to a condonation; and if it did, it was a conditional offer which not being accepted is to be taken as actually withdrawn." Per *Lord Stowell* in *Ferrers v. Ferrers*, (MS. note,) Consistory, 5th March, 1791.

plea was admitted after an opposition. It alleges, that the parties married in 1712; that the husband treated the wife with cruelty; and he committed adultery in 1720: and in 1728, the parties were living together, for acts of cruelty are then stated. I presume, then, the action taken was, that after 1720 they were living together, and the ground on which the Court could admit the act of adultery was, that it was revived by the cruelty. The Court, however, overruled the action. It has then been considered in this Court, that circumstances take off the effect of condonation, which would not support an original cause. Facts of cruelty revive adultery, though they would not support an original suit for it. The condonation, in this case, is such, that it is hardly necessary to resort to the authority of Worsley, but it confirms the doctrine, that facts would revive which would not be a sufficient ground for an original proceeding.

It is held that words of heat and passion, of incivility, or reproaches are not alone sufficient for an original cause; nor harshness of behaviour; but I cannot but think that their operation would be stronger in the case of condonation. Words, otherwise of heat, receive a different interpretation if upon former occasions they have been accompanied with acts; it is apparent that the party was in the habit of following up words with blows: and on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit.

The parties returned to live together—not voluntarily on her part, and I cannot consider her acquiescence as amounting to a complete forgiveness: it was almost an extorted consent. There was no return to connubial cohabitation; for though she slept in the house for several nights, it was in a separate bed, and though it is suggested that the separate bed was not aired, yet the contrary is proved, and the husband only insinuated this defence in interrogatories.

As to the manner in which the party lived after this return to cohabitation, four witnesses have been produced: and objections have been taken to them which must necessarily attach in all such cases: for, domestic conduct, friends, dependants, and servants alone can speak of it. They must have some bias, and the Court must be on its guard against it; and I shall therefore receive this evidence with some drawback. Linneard, a servant, says: “The Baron took every opportunity to vex her; he dined at another house, he did all he could to prevent her coming home—to vex her; he threw pieces of meat which fell on her clothes, on the plate, or the table-cloth; said ‘she might eat or be damned;’ quarrelled and abused her every day—swore at and terrified her.”

I must never forget that the lady was above seventy, and that what may be relative cruelty: and what is tolerable by one may not be so by another. “He took the keys of the closets; deposed her from the management of the family—locked up the tea, cakes, &c.” These things would be necessary to persons used to such indulgencies and at such an advanced time of life. “The deponent feared he would do her a mischief; he asked leave to go out—he swore and spit at her several times; made her go and undress; she was terrified at him, and her health was much impaired: he prevented her going to pay a visit to his own sister.”

It is said the husband has a right to restrain the visits of his wife, and so he has; but his rights may be enforced in an illegal manner. It is insinuated he had any just ground to restrain her; and it may be that it is not necessary to show such: but the Court is to consider

ther he exerted his right in a proper manner. In my opinion he has taken off the effect of any such justification by the manner in which he has exercised his marital authority.<sup>(a)</sup> The witness continues: "he told her to get ready to go to the Court of Chancery, and receive her money: she said, she did not want it and would not go: he swore at her, held his clenched fist in her face; said he would do for her: she said she would not go without her trustee: he forced her to go with her maid, who was obliged to hold the smelling bottle to her nose all the way."

It is said he had a right to insist on her going to receive the money; but this was not to be enforced by brutal violence; but in fact, he had no right, for it was her own separate property, and she was well justified in that moderate resistance she made. Again it is said there was no actual violence, but that was unnecessary; because threats succeeded in compelling her.

The witness further says, "the Baron's sister and nieces came on the 19th of August and observed her health and spirits were so bad that air would be of use to her: they asked her to go and visit them." Her conduct seems to have been dictated by a care not to offend him: she hesitates but at last goes. "He was in a passion, swore he would play hell with her, would take care she should not go out again; he would do for her. The witness and other servants were alarmed for her, and her health was affected." Kahlen confirms this: he insulted her by asking her to eat pork, &c.: deponent was so apprehensive of his doing mischief, that she removed knives, &c. out of the way. He insulted her by talking of his amours before her; was in a passion if deponent spoke to her. Though her regular meals were served, he prevented her eating by terrifying her, so that she did not eat at all—she became ill: deponent was seriously afraid she would die." This witness is confirmed by Coto and Simmonds.

I think this lady was in that state of oppression which fully justified the step she took in withdrawing from her husband. That is the point which I have to determine: for, if she was not justified, I must pronounce her under the obligation to return. I think, in so doing, I should place this woman, at an advanced period of life, and who appears to have conducted herself well, in a situation which would expose her person to that bodily hazard and intolerable hardship from which the law of our country is bound to protect innocent subjects. I think that she has proved her case of cruelty.

Next, as to the adultery.

It has been suggested that the Jewish religious regulations allow concubines. By the Mosaic law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian Court to which they have resorted; and, if it could be noticed, it ought to have been specially pleaded; but I think it could not.

A minute inquiry into the adultery is not necessary, as the Court is satisfied on the other branch, cruelty. Four witnesses, Elizabeth Smith, Mary Vincent, Catherine Fakes, and Harriett Smith, if believed, prove the adultery with Susannah Lewen, with whom the libel pleads he had lived and was living in a state of adultery. No objection is made to Mary Vincent, except from her conversation with Elizabeth

<sup>(a)</sup> See the observations in *Waring v. Waring*; and the *note*, 2 Consist. Rep. 159.

Smith, which does not expose her to reproach: for she conducted herself very properly. She says, "his bedroom was on the same floor with Lewen's and communicated; went to separate rooms at night, but only one bed used; impression made of two persons: Lewen confessed it, and with sorrow; had told her that the child living in the house was her daughter by the Baron D'Aguilar." She is confirmed by the evidence of the other three witnesses, and also by Coto, as to the acknowledgment of the child by the Baron.

Fakes says, "When she knocked at the door of the room, sometimes one, sometimes the other, came in their shirt or shift: there were two impressions in the bed,—witness heard them talk together. The other bed, in which the child slept, was the child's bed, and there was no other bed in the house."

The adultery is almost admitted in the interrogatories by insinuating the defence that the wife was cognizant and had forgiven. There is no evidence which satisfies the Court that she was apprized of it in any other manner than upon general or probable suspicion: it is not shown she knew it so that she could legally prove it. If it was shown that he had avowed it to her, it might be a condonation as to that particular fact: here, on the contrary, is evidence inducing a belief there had been no such avowal. His laughing in a sneering way when the child called him "Papa" in her presence, proves that it was not openly known. Why should he have so done had he mentioned the subject to his wife?

But if she overlooked one act of human infirmity, it is not a legal consequence that she has pardoned all other acts; that she tolerates all other debauchery: her forgiveness is confined to that one act. Condonation, with respect to women, is not held to bear so strictly: a woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her: therefore the rule of condonation is held more laxly against the wife. But it does not follow, that, because she overlooked one offence, which she could not prevent, that is to be construed to give an universal licence to unlimited debauchery.

That the Baron did indulge himself in other amours is demonstrably proved, partly by Vincent, to whom there is no just exception. She says, "She was with the Baron when Fellows came and implored him to do something for her, for he knew he was the father of the child she was pregnant with: he said, she was a bad woman when he was connected with her; the child might be another's." This is as near a direct confession of guilt as can be. "At last he ordered the deponent to take a lodging for her; she was supported by him. Fellows told deponent he had seduced her by intoxicating her." She speaks also to another fact, as to Lucy Dean. There are facts laid with others, but these are only proved from the probability as to the use he made of the houses, and therefore I do not lay much stress on them. I am satisfied that adultery with three different persons is proved; and the wife is no doubt entitled to the sentence of separation. It remains, therefore, to consider the question of costs.

In general, the husband is bound to defray the wife's costs; otherwise the wife would be disarmed and denied justice.<sup>(a)</sup> The husband has by

(a) Vide *Bray v. Bray*, and the authorities referred to in the note, *supra*, 77.

the law of this country all the property; and therefore, the wife must have the means of self-defence, and of subsistence from him; but when she has a separate fortune, the Court always considers whether such separate means are sufficient for self-defence and subsistence. If it deems them sufficient, she is not entitled to alimony and costs during suit. These considerations press here. The wife stands without that particular claim on the husband, but upon the common footing of a litigant party, who has, on proving his case, *prima facie*, a right to the expenses to which he has been put by the injustice of the other party. Costs, however, are a matter of discretion in which many things are to be taken into consideration; and the Court may, under circumstances, relax the rule. I have looked into this case for circumstances which would exonerate the husband, but without success. On the contrary, I find considerable aggravation. This lady of advanced age, of infirm health, void of reproach, who behaved apparently remarkably well to her husband, is, without provocation, treated with insult, with ill language, with menaces, and with violence occasioning fear for her life; the husband, at an advanced age, with passions under no degree of control or discipline, committing adultery and indulging himself in unlimited debauchery! There is no favourable ground, then, on which to release him from costs; and, on the whole, I consider I am bound to pronounce that the lady is not only entitled to a separation, but to her costs.

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BEEBY v. BEEBY.—p. 789.

In a suit for separation *a mensa et thoro* by reason of the wife's adultery, she, having in a plea of recrimination, or *compensatio criminum*, proved a long series of misconduct—(adultery, solicitation of the servants' chastity, and venereal disease communicated to her)—for which she separated from him long prior to the adultery committed by her, is entitled to her dismissal; nor will a return to live in the same house, after a former separation on account of the husband's adultery, operate as a condonation so as to extinguish her right to set up his guilt as a bar to his prayer.

The doctrine received in the Ecclesiastical Courts of England from the civil and canon law that a plea of recrimination or *compensatio criminum* is a valid plea in bar, is founded on the principle that a man cannot complain of the breach of a contract which he has violated.

Condonation is forgiveness legally releasing the injury, and may be express; or implied, as by the husband cohabiting with a delinquent wife; but the effect of cohabitation is less stringent on the wife, and condonation by implication is not held a strict bar against her, for it is not improper she should for a time show a patient forbearance and entertain hopes of her husband's reform.

Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed; it does not rest merely on the wife's not withdrawing herself.

Unpleaded condonation can only avail as a bar so far as it is fully established by evidence.

The general presumption is that a husband and wife, living in the same house, live on terms of matrimonial cohabitation; but particular circumstances may repel that presumption.

It does not follow that because condonation will bar the remedy of a party agent, it will destroy the defence of a party recriminating.

The *King's Advocate*, (Sir John Nicholl) and Dr. Laurence, for the husband.

*Dr. Arnold, contra.*

JUDGMENT.

Sir WILLIAM SCOTT (Lord Stowell).

THIS is a suit of adultery brought by the husband. The marriage took place in 1790, the woman being a minor; and the parties lived together for six years. It is pleaded that the wife quitted his society in or about June 1796; but of that fact no proof is afforded on the part of the husband, except by one witness, who says, "that they separated about June 1796." The articles of separation, though called for by the Court, are not produced, but they were executed on the 27th of June, 1796. It seems probable that the separation took place some little time before; it is unlikely that parties in such a state of feeling towards each other should cohabit: on this general presumption then I should be disposed to antedate the fact of separation.

To the character of the lady there are strong testimonials, both as the best of mothers and of wives; her husband himself bears the strongest testimony by committing to her the charge of three female children. From this height of character she has fallen, for it cannot be denied that adultery is proved. The husband pleads that Mr. Rochfort, an acquaintance of his abroad, formed a deep scheme for the ruin of his wife; but of this there is no proof except that he visited her three times, on the last of which they mounted their horses together and went away. They were found cohabiting together as husband and wife, and identity is completely proved.

But a plea in bar has been given—a plea of recrimination or *compensatio criminum*—a set off of equal guilt on the part of the husband. The doctrine, that this if proved is a valid plea in bar, has its foundation in reason and propriety: it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first violated his marriage vow, should be barred of his remedy: the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt. On these and similar grounds the doctrine of the civil law has been transplanted into the canon law, and with that received in the ecclesiastical courts of this kingdom, where it has taken deep root. (a) The husband's is no ordinary case of guilt: there are no circumstances of extenuation; it is not the case of a man led away by the sudden impulse of passion, seduced by an unlucky attachment, or driven by ill temper of his wife to seek the solace of softer society—not a case where the charms of the wife were decaying—not where the illicit pursuits were followed in secret and at a distance; but there is deliberate depravity from the time of his marriage, and habits of low debauchery from the first year of cohabitation to the last—among his own servants, in whose good conduct most persons seek a great part of their happiness—under the notice of his wife—a young wife exemplarily performing all the duties of a wife and a mother.

Many witnesses prove to my mind the husband's misconduct from

(a) See *Forster v. Forster*, 1 Consist. Rep. 146 *et seq.* *Proctor v. Proctor*, 2 Consist. Rep. 297-8.

the time of his marriage. Sarah Prickett lived three months in the family in 1791; she proves that by his attempts she was forced to quit the family, that she gave warning, but that Mrs. Beeby would hardly believe her story; and the nurse says that her mistress was so much affected by hearing of his infidelity, that she would not allow her to suckle the infant for two days. The witnesses speak not only to their own adventures, but to the universal complaint of all the female servants—from fifteen years of age to upwards of thirty: he showed no partiality. Jane Knapp, the cook, speaks to solicitation of herself and of Susan Chandler. As to Cherry Funnel, the cook, the transactions are spoken to by the footman. It is not necessary to go minutely into the matter, but it is impossible to contend, connecting it with the general habits of this man's life, that it does not afford satisfactory proof of actual adultery. Sarah Hildin speaks to attempts on herself and others, and particularly that a child of fourteen years of age was sent out of the house lest she should fall a victim to the persecutions of this husband.

In 1794 the husband communicated the venereal disease to his wife: there is no doubt upon the evidence that such was the case, and that the infection was recent. The husband would have made that excuse if it had been an old complaint breaking out anew. The Surgeon gives his opinion that it was recent, but that Mrs. Beeby would incur no future danger by cohabiting as the husband expressed such deep contrition; he however is a bad reasoner, for her husband's contrition was short-lived. Sarah Clark speaks to subsequent solicitation, that he was continually taking liberties with her person; and Sandall gives an account of assignations at the same period with Shaw: and looking at other parts of the history, there can be no doubt for what purpose these were made. The declarations of the wife, spoken to by the surgeon, that the husband had again infected her, are no proof of the fact, but they show her impression: her conduct all this time was perfectly correct—spotless on her own part—patient under all these provocations—endeavouring to remove the objects of his misconduct.

This is the substance of the evidence, and I forbear to make observations on it. What ideas this gentleman has of religion, of the laws, and of the decency of manners of the country which he inhabits I know not; but if such conduct were general, the kingdom would be one universal brothel, and those would introduce corruption who ought most to repress it. The result of all this is, that if it had not been the misfortune of Mrs. Beeby to become the wife of such a husband, she would have filled her station most honourably. She is insulted for years; her health is at least affected; she retires indignant, she is deprived of the lawful pleasures of the marriage bed, to which she was entitled; and at last falls a prey to the schemes of a friend of her husband's worthy of his friendship by similarity of manners: he completes the ruin to which it can hardly be said the husband was not originally and mainly instrumental. These are circumstances of extenuation in the fall of the wife; and if the case rested here I should clearly dismiss her from this suit.

But condonation has been set up in order to take off the effect of the *compensatio criminis*. I will first consider the proof, and then the effect of condonation. Now condonation is forgiveness legally releasing the injury: it may be express: or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her; but the effect of cohabitation

is justly held less stringent on the wife; she is more *sub potestate*, more *inops consilii*; she may entertain more hopes of the recovery and reform of her husband; her honour is less injured, and is more easily healed. It would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time show a patient forbearance; she may find a difficulty either in quitting his house, or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife:—a woman may submit to necessity. It is too hard to term submission mere hypocrisy. It may be a weakness pardonable in many circumstances. (a) Here no condonation is pleaded: it is only taken up in argument from a passage in the evidence; if clearly proved, though not pleaded, I will not say it may not be sufficient, but the Court will never help it out, as it would operate as a surprize on the other party. If pleaded, equivocal facts might be explained: it therefore shall avail so far only as it is fully established by evidence. What are the facts here? The wife when informed of her husband's misconduct at first hardly believes it; then is surprised and concerned when satisfied of it by many unhappy proofs, and endeavours to reform him: when she is infected, she declares she will quit him; she flies to her mother, is not received, and is obliged to return. The husband expresses contrition, but continues the same misconduct. She makes declarations of being again infected; the husband does not amend; he again solicits the chastity

(a) So again, on the admission of the allegation; "Condonation is objected. But the Court is not to hold that strictly as to the wife: it is a merit in her to bear, to be patient, and to endeavour to reclaim; nor is it her duty, till compelled by the last necessity, to have recourse to legal remedy."

The same sort of language was again held by Sir William Scott, (*Lord Stowell*) in *Dance v. Dance*, Consistory, 1799, 22d April.

*Per Curiam.*

"This is a suit brought by Catharine Dance against her husband, on account of adultery of an aggravated kind, incestuous with the wife's sister. The parties were married on the 1st July 1791; they were fruiterers in Oxford Street, but it does not appear on what terms they lived together prior to 1796, when the history commences: the parties then had separate beds, which does not seem imputable to the wife, but to have been the determination of the husband; though on what ground there is no evidence. They never, as far as appears, bedded together afterwards, and, therefore, what has been said of condonation is quite out of the question: there must be something of a matrimonial intercourse presumed, in order to found it; it does not rest merely on the wife's not withdrawing herself. But the Court does not hold condonation so strictly against the wife, from whom it looks for a long suffering and patience not expected nor tolerated in the husband: he is expected to complain to the Court immediately. The wife is more *inops consilii*; she may hope to reclaim her husband. Now, the sister of the wife lived in the house, and gross and odious familiarity is proved: she laced her stays before him without a handkerchief on; she undressed to her shift, when going to bed, in the presence of this man; his wife, his sister, and others, were also present; and as it is not stated what was said by them, it has been argued that they were not offended. It however appears that the brother did remonstrate, and it is not to be presumed, that this conduct was not disapproved of by the others, for there was nothing to lead the witnesses to mention their expostulations, if any such were made."

*Note.* Three maid servants, examined about the same period, proved acts of indecent familiarity, of gross indelicacy; and that she was seen coming out of his bed-room on the morning of the 25th of May, 1797, in her shift, without shoes, and no clothes on, and desired the witness not to tell the wife, her sister: the witness however did inform her at or about that time, and in consequence she withdrew from his house on the 29th of December.

The Court pronounced for the separation.

of his servants; he is proved to have done so as late as April, and she quits his house, certainly as early as June, but I think sooner.

I am told, "I must presume—that she forgave him; that she voluntarily returned; that she continued to admit him to her bed, as they were not in separate houses; that the separation took place on the ground of another misunderstanding—temper; that they separated in perfect friendship; that they mutually engaged when they parted to live chastely, and that she was bound to presume that the husband had never violated that engagement, and to act accordingly." If I am bound to act upon presumption, I should presume in almost every instance the reverse,—that such conduct, especially the communication of disease, must have raised the anger of the wife; the communication of a painful and nauseous disease in the midst of conjugal endearment! Surely if there is an injury almost beyond forgiveness, it is what had taken place here, and this was treatment under which beyond all others the door of a parent ought to have been open to her child. Her mother however refused to receive her, and her return consequently was the result of necessity: but if it had been voluntary, still there may be circumstances in which, even under such injuries, it may be right for a wife to return; there may be hopes of the husband's reformation. How the husband was reformed is apparent from the evidence; some of the witnesses say, that after her return they lived on good terms; others—not. The general presumption is, that a husband and wife living together in the same house, do live on terms of matrimonial cohabitation, but particular circumstances may repel that presumption; and taking together all the evidence before and after that return, I lean the other way. I think that here it is more probable they did not; and the deed of separation recites that unhappy disputes had occurred. Again, the presumption is that the husband's conduct continued the same as before; for that this man should devote himself to chastity is as probable as that the Ethiopian should change his skin. These are the presumptions to which the evidence would draw my mind.

It is however sufficient that that evidence is only equivocal. Condonation, if set forward in this manner, must be fully proved; but here it is left equivocal. But what is the effect of condonation? In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released; but here the plea in bar is *compensatio*: and condonation is not in bar of the action, but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act which will bar the remedy will operate on the other side. And unless it is an universal rule that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? Does her act bind the Court? If both are equally guilty, will her condonation make him *rectus in curia* and enable him to procure a sentence?

There may be cases where a wife may by forgiveness, by cohabitation, by the reformation of the husband, be so barred, that an obsolete fact shall not be a defence. This bar would not, however, be effected so much by condonation as by the general state between them, and the consequent impossibility of reviving former follies. It is impossible to assimilate this to the cases I have put, unless I can compel my mind

to a belief that Mr. Beeby has complied with the vow of chastity supposed to exist in the articles of separation; that however I cannot do in the present instance.

It is said, that condonation is favoured because it induces the parties to live together again; but here the effect would be to separate them, to shut the door more completely against a return: here, if the Court does not pronounce a sentence of separation, is no impossibility of a return. Both have much to be forgiven: the wife for the injury done to the children, whom she has deserted, to her husband whom she has dishonoured, to her own character which she has disgraced, and to society, which she has outraged. The husband has still more to be forgiven, even as the means of his wife's misconduct. It has been much pressed that the children will be injured by a dismissal of the parties, but this is a bad plea for the father who has occasioned the mischief: and the answer is prompt and legal; he must not press on the Court considerations for those whom he has not himself considered. The consequences are to be warded off by other means. It frequently, however, happens, that these consequences fall by law, as by nature, on the innocent connexions of guilty persons: but the effect is to bind duty more strongly on all. I think if a divorce is granted under these circumstances it will be granted in such as never before founded a sentence: and I shall be content to receive such a precedent from the superior tribunal; but my opinion is that Mr. Beeby is not entitled to the sentence he prays; and I therefore dismiss the wife.



# **REPORTS**

**OF SOME**

## **RECENT DECISIONS**

**BY**

**The Consistorial Court of Scotland,**

**IN**

## **ACTIONS OF DIVORCE.**

**CONCLUDING FOR DISSOLUTION OF MARRIAGES CELEBRATED  
UNDER THE ENGLISH LAW.**

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**BY**

**JAMES FERGUSON, Esq. ADVOCATE,  
ONE OF THE JUDGES.**

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## REPORTS, &c.

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ELIZABETH UTTERTON, otherwise TEWSH, v. FREDERICK  
TEWSH.—p. 23.

[October 25, 1811.]

THE defender in this case was cited at Tranent in the county of Edinburgh, on the 29th of May 1811, by personal service of a summons, in which the pursuer stated, that the parties had been married in England on the 22nd of July 1790, and had cohabited in that kingdom till the beginning of the year 1806; but alleged that he had then deserted her society, and had afterwards lived in adultery with different women, both in England and in this country; and upon these grounds she concluded, in the usual style, for a divorce *a vinculo matrimonii*.

He appeared, and in defences admitted “that he has for some time past resided in Scotland,” adding merely as to the cause, “that he is under *the protection of the Court*; and with that impression, *he leaves the pursuer to adopt such steps as she may judge proper*.”

The Commissaries apprehended collusion, and did not appoint the pursuer to depone *de calumnia*, and afterwards proceed to allow a proof of the defender’s guilt, according to previous usage in cases where no objection to the action was maintained *in limine*, but gave this deliverance: [July 12, 1811.] “In respect that the parties appear to be English, and that the marriage is stated to have been an English contract, before further procedure, appoint the pursuer to state, in a condescendence, the grounds, both in fact and in law, on which she maintains that this Court is competent to entertain her action.”

In her condescendence as to the “grounds in fact,” the pursuer stated, that “the defender was resident in Scotland *for more than forty days* before the present action was raised. Several of the acts of adultery charged in the libel were committed in Scotland. He was personally cited here. He has made appearance in the action, and has given in defences *in causa*.” Hence it was assumed by her to “follow in law, that the defender was subject to the jurisdiction of this Court, first, *by reason of his domicil*; and, secondly, by having *prorogated* the jurisdiction of the Court, if it had required prorogation.”

The last of these propositions was held to be proved by the record. In support of the other, it was pleaded in this paper, “that foreigners *acquiring a domicil* in this country, became equally amenable to its laws as natives;” except as to actions affecting heritable property abroad, or concluding for punishment of crimes not committed within the territory of this kingdom. In particular, it was observed, “that, in all personal actions, all real actions with regard to moveables, and in all questions of *status*, jurisdiction arises from domicil alone, and falls to be sustained from the most obvious considerations of expediency, because access

could only be had there to the defender, who must be amenable to the jurisdiction of the territory in which he is found."

As to what was termed "the doubt started by the Court itself," it was admitted, that, "if the law of England is to govern the case, adultery is no relevant ground for setting aside the marriage. But," it was observed, that, "if the law of Scotland is to be followed, the opposite conclusion is indispensable." And it was contended, that, "while domicil created jurisdiction in questions of *status*, these likewise fell to be decided according to the law of the domicil where the act took place, out of which they originate. Thus the law of the *domicil of constitution* must determine as to the validity of a marriage, or the contract of a servant with his master; or the incapacities arising from *infamia juris*, imposed by legal sentence, but only so far as not inconsistent with morality or religion in the territory to which the party removes."

Rights of personal *status*, in particular, which a foreigner imports, it was further pleaded, become subject to dissolution or alteration by the law of the *new domicil* to which he subjects himself. Here the right of the pursuer of this action to the *status* of husband resulted from the relation of marriage itself, and not from any express or implied covenant of the parties, like those contained in a deed of contract relative to patrimonial concerns. Although the law of England would afford the rule as to the interpretation and effect of an English patrimonial contract of marriage, the law of Scotland must dictate the remedy for violation, within this kingdom, of the duties of the conjugal *status* imposed by the relation of marriage itself. But even the patrimonial interests of the parties, in the event of the dissolution of their marriage by the death of one of them, without a deed of contract, would be regulated by the law of the husband's domicil at the time. Thus, if spouses who had married in Scotland without a contract were to be domiciled in England at the date of such dissolution, by the death of the wife without issue, it could not be held that her executors might divide the goods in communion with the husband, by the rule of the law of Scotland, upon the presumption that it was the implied will of the parties, when they married, that the *lex loci contractus* should regulate all their patrimonial interests under that marriage.

In the next place, the right of prosecuting a divorce on the head of adultery, (it was said,) is a consequence of the pursuer's *status* as a wife, which she holds, independently of all contract of parties, which no stipulation in a contract of marriage can control or modify, and which must receive effect according to the law of the domicil. On this point, the following authorities of the Civil law were referred to: *Rodenburgius, De jure conjugum*, tit. 2, cap. 1. § 1. Joan a Sande, ad l. 9. De reg. juris, § 18. as to the repetitio dotis, &c. Hertius, De collisione legum, § 4.

The law of England, too, was held to confirm this view. Because no divorce, by judicial sentence, had ever been granted in that kingdom, a *vinculo* of a Scotch marriage between Scotch parties, although domiciled in England, when adultery was committed by the one, for which the other sought redress, and because a Gretna Green marriage by English parties, within the territory of Scotland, did not bestow the patrimonial rights of a Scotch marriage, along with the *status*; and, accordingly, in the case *Ilderton versus Ilderton*, reported by Henry Black-

stone, 2 Ff. p. 145, the surviving wife of such a marriage did not obtain a Scotch terce, but an English dower.

The decrees of divorce, given by the Consistorial Court of Scotland, although the *locus contractus* had been within the territory of the English law, in the cases of Lindsay against Tovey, 26th January 1807, Lady Paget against Lord Paget, 12th October 1810, and Rogers against Wyatt, 28th June 1811, were referred to as proving that an English marriage might be dissolved here for adultery, if the defender had a domicile in Scotland when cited in the action. (a)

To this condescendence the defender answered, in obedience to an order of Court, so far as regarded the form of debate, by merely observing, that, "as the condescendence for the pursuer has been prepared and lodged in consequence of an order of the Court itself, to enable the Commissaries to deliberate on the competency of the present action, it would be unbecoming in the defender to interfere. He shall therefore satisfy himself by stating, in answer to this elaborate paper, his entire confidence that the Commissaries will decide this point of competency, agreeable to law and justice. He therefore leaves it with the Commissaries, remarking only, that if the pursuer, on the one hand, be entitled to discuss the merits of the action which she has thought proper to institute, he must, on the other, be equally entitled to bring forward and insist on all relevant and competent points of defence."

The deliverance of the Court upon these papers was, (August 21, 1811,) "The Commissaries, having considered the condescendence for the pursuer, and whole process, in respect there are no circumstances condescended upon to shew that the defender is in this country *animo remanendi*, and that he has formed a real and permanent domicile here: Find the condescendence insufficient to establish the competency of the Court to entertain the present action, but allow the pursuer to give in an additional condescendence, stating all facts and circumstances tending to prove that the defender has come to this country *animo remanendi*."

The pursuer, as the terms of this interlocutor imply, hearing the opinion of the Court, had offered an additional condescendence, upon the ground that the meaning of the Court had been mistaken, when the paper which had been under consideration was framed. In that pleading the presumptive domicile, which is founded upon 40 days residence, and affords opportunity to constitute jurisdiction by citing the defender at his dwelling-place, only had been alleged, whereas the Court had now signified that they required evidence of the real domicile at the date of the action. Accordingly, an additional condescendence was lodged by the counsel for the pursuer, in which she alleged,

"I. That the pursuer and defender were married at Waltham, Holy-cross, in the county of Essex, on the 22d day of July 1790. They lived happily together as man and wife for several years, during which time they had two children, both of whom are since dead.

"II. After their marriage, the parties lived for some years at Chingford, in the county of Essex, and afterwards at Cheshunt, in the county of Herts, till it became evident that the affections of the defender were alienated from the pursuer, his wife, and he fell into courses of adultery

with different women. At length he deserted the pursuer altogether, and left her unprovided of the means of subsistence. She has for some time past been supported by her own relations, a small annuity, which was secured to her by her marriage-articles, not being sufficient for that purpose.

“III. The defender did every thing to avoid the pursuer, and to elude her just claims while he remained in England. At last he thought proper to make an elopement to this country. This took place, as the pursuer has every reason to believe, in the end of the last, or in the beginning of the present year. The pursuer was unable to ascertain the place of his retirement until the month of March 1811, when it was discovered that he had come to Scotland, and was living at Portobello with a woman who had accompanied him from London.”

The other articles of this condescendence related in part to the circumstances of the alleged criminal connection. But as to the fact of residence in Scotland, it was likewise farther averred, that “the pursuer had not learned where they resided from the month of January to the month of March. But on the — day of that month, they were found living at the house of Mrs. Mackinnon at Portobello, and there they lived at bed and board together as husband and wife, till towards the end of April. The defender, with the said woman, then removed to Mrs. Gray’s in Greenside Street of Edinburgh, and lived there at bed and board, as husband and wife, during the space of about one month, immediately after which he received his citation in the present action of divorce.”

To this last condescendence no answer was made by the defender, nor did he at the bar deny the facts therein alleged.

The Court having proceeded to decide the cause, two of the Judges were of opinion, that the facts alleged could not, if proved, be held sufficient to establish that the defender had really changed his original domicil of England, by dwelling in this country a few months. For he might have come here not *animo remanendi*, but merely to avoid legal claims against him in his own proper *forum* of England, or to afford opportunity for dissolving his marriage, in fraud of the English law. The concealed and unsettled nature of his abode at different places in Scotland, as alleged by the pursuer, and the tenor of his own pleadings *in judicio*, afforded, even upon the face of the record, strong reasons for inferring, at least, that he had no intention of making Scotland the place of his permanent abode. At all events, if the pursuer’s allegations were fully proved, it would not follow, that Scotland had become the defender’s peculiar domicil, according to the law of which, if he had died intestate at the date of citation, his moveable estate would have been distributed in preference to the law of England. (a)

They observed, that there were only two kinds of domicil known in the law of Scotland, with relation to such actions as the present. The one was the real domicil chosen by the party, with the intention of making this kingdom the seat of his fortunes, and place of his permanent abode, or, in other words, his country and home. The other was the

(a) Cod. Jur. Civ. lib. i. tit. 16. Leg. 239, § 2. *Ibid.* lib. x. tit. 39. Leg. 2, 3, 4. *J. Voet*, lib. v. tit. 1. § 92 and 97; 7th June 1791, Hog against Hog, Fac. Dec.; 9th February 1789, Brunsdon against Wallace, Fac. Coll.; 27th June 1801, Morcombe against Macclelland, *Mor. Dec.*

*presumptive* domicile assumed by a fiction of law, in the case of a foreigner, from forty days residence, to afford opportunity of founding jurisdiction in ordinary civil suits, by citation left for him at his dwelling-place, when it might happen that he could not be served with a personal execution. (a) This presumptive domicile, however, made no alteration as to the nature of the obligations or duties to be performed by a foreigner in his own country. In particular, as to any condition of a contract entered into there, and with a view to fulfilment in that country, the rule as to redress or remedy to be afforded for violation, must be sought in the law of the place where the defender stood bound to perform his engagements to the pursuer. Both were strangers in Scotland, where confessedly they had never cohabited, and the only duty of the law of this kingdom towards them, was to adopt their own, to which they still remained permanently subject, and to give them such decision as it would have pronounced. This, too, was the more necessary, because the judicatures of the kingdom to which the parties belonged, might decline to respect the judgment of the Scotch Consistorial Court, if contrary to their own rule in a matter so important as the dissolution of marriage. The English law, it was understood, did not permit such dissolution by judicial sentence. Here, on the contrary, divorce *a vinculo* was granted upon proof of adultery. But if it should be held in England that such violence upon our part to the conditions of an English marriage in a suit between English parties carried on here was illegal, our divorce, supposing it to be given, might be disregarded in England. The spouses, consequently, might still be held as bound to each other there, although declared free in this kingdom. Subsequent marriages might thus be considered valid in the one country, and null in the other, to the great danger of the parties, and with the most fatal effects to their offspring, and to the good order of society. To avoid these evils, there was no other course but to dismiss as incompetent an action, which like the present, concluded only for dissolution of an English marriage.

It was further observed, that, according to the authority of several recent decisions, the Consistorial Court ought directly to decline its jurisdiction, when that jurisdiction could only be exercised to the effect of dismissing the process. Thus, in the case of *Brunsdone against Wallace*, 7th February, 1789, Fac. Col. upon an advocacy of the defender, who had not appeared before the Commissaries, the Court of Review remitted to them "with instructions to dismiss the action," on the grounds, that, although a Scotsman by birth, his domicile was foreign, and he had only been cited edictally. Afterwards, in the case of *Pirie against Lunnan*, 8th March 1796, the Commissaries, "in respect that the domicile, both of the pursuer and defender, is situated in London, and that the facts founded on in the libel, as inferring the defender's guilt of adultery, are stated to have happened there, dismissed the action as incompetent."

Again, in the case of *Wyche against Blount*, 27th June 1801, "The Commissaries, (20th February 1801,) having considered and compared the libel with the proof, found it not proved, either that the marriage of the pursuer or defender, who are not Scotch, but English, by birth, was celebrated in Scotland, or that they cohabited in Scotland as husband and wife, any time after their marriage, or that the defender has had

(a) Ersk. Inst. b. i. tit. 2, § 16, p. 29.

any sufficient or settled residence in Scotland, or even that the crime on which the divorce was founded was committed in Scotland: Therefore, found, that the action is not competent in Scotland, and ought not to have been brought before this Court, and dismiss this process for want of jurisdiction."

In both of these two last cases, the Court of Review, upon pleadings for the pursuers, *ex parte*, no doubt altered the interlocutors. But the principle of the first of these decisions by the Superior Tribunal, can only be gathered from the statement given by the reporter of the Judges' opinions. These, he says, were, that "in this case there can be no harm in allowing the action to proceed, and decree to be obtained in absence, *valeat quantum valere potest*." In the second the pursuer offered to refer to the oath of the defender the fact, that he had subscribed a certificate of their marriage at Gretna Green; and the Court of Review remitted to the Commissaries, with instructions to find this reference competent, and to grant commission for taking his oath, as well as to sustain their jurisdiction, "in respect the summons was executed against the defender when resident in Scotland, and possessing a domicile there." So far, however, was the principle adopted in the Consistorial Court from being shaken by these judgments, that, in another case, Morcombe against Macclelland, remitted upon the same day with that of Blount, the Superior Tribunal supported, without alteration, a judgment of the Commissaries, by which they, "considering that the Courts of one country ought not to be converted into engines for either eluding the laws of another, or determining matters foreign to their territory, and that decrees of divorce, pronounced by incompetent courts, cannot, effectually and securely, either loose the bonds, or dissolve the marriages, or fix the states of the parties thereto, but might become causes or snares to involve other persons, as well as the parties and their children, in deep distress; and observing it to be admitted in the libel, that the marriage of the pursuer and defender was celebrated in England; that they resided constantly in England since their marriage; and even that the crime on which divorce is here demanded to be decreed was committed in England; therefore find, that the action is not competent in Scotland, and ought not to have been before this Court; and dismiss the process in all its parts, for want of jurisdiction and of power."

Another of the Judges agreed in thinking, that the action should be dismissed, but upon different grounds. He observed, that the marriage sought to be dissolved is an English contract, by its own inherent condition and essential quality, perpetual, and incapable of dissolution during the joint lives of the parties. (a) The relation of husband and wife has likewise subsisted between them only in England, and under the English law, for the whole period of their cohabitation. But the conclusions of the pursuer rest upon a criminal transaction of the defender with a third person in this country, which could have no effect to alter the condition of his marriage, considered as a contract with her.

The law of England, according to the authorities (b) of greatest weight,

(a) Inst. Jur. Can. lib. ii. tit. 16; Coke upon Littleton, b. 3; Inst.

(b) Huber, De Conflictu Legum, Vol. II. b. i. tit. 3, § 11. et seq.; Dirleton, Doubts and Questions of Law, No. 227 and 229; Bank. b. i. tit. 1; Ersk. b. iii. tit. 3, § 40; Delvalle against Creditors of York Buildings Company, 1786, Fac. Coll.; Brunson v. Wallace, 9th February 1789, Fac. Coll.; Morcombe v. Macclelland, 27th June 1801, Mor. Dec.

both of our municipal system and *juris gentium*, therefore, fell to be preferred as the *lex loci contractus*, even if the defender had really changed his proper domicil of permanent residence, so as in the eye of law to have ceased to be a subject of the law of England, and to have become a subject of the law of Scotland, at the date of the action. For the law of England declared a marriage under it to be indissoluble by any judicial sentence, and certainly had power to establish this rule. The parties had also, by express stipulation, according to the ritual of marriage in their own country, bound themselves to each other indissolubly as husband and wife. Their contract was, consequently, not only valid in England, but to be held as equally valid in any other country to which either of them might afterwards migrate.

The remaining Judge of the Primary Court gave his opinion, that the Court ought to sustain its *jurisdiction*, so far as to go into the question; because the action of the pursuer undoubtedly was of a class which it had competency to entertain. That action was likewise regularly laid in the usual form, and the defender had been duly cited and convened. (a) The question, *What rule of law*, whether municipal or foreign, should govern the decision? was a matter altogether different. In the phraseology of several former decisions, these points seemed indeed to have been confounded; and the Superior Court had not corrected the style adopted by the Primary Tribunal when interlocutors of this description came to be reviewed there. But the general import of the interlocutors, as these affected the causes and the parties, was all that fell to be considered in questions of remit; consequently, the mode of expression could not be held to form part of the precedents, and, if inaccurate, should have no influence upon future cases.

The pursuer, in the present case, did relevantly allege and undertake to prove injuries, for which redress somewhere must be competent. But in England it was asserted that she could have none; for without personal citation of the defender in that kingdom, there could be no suit at her instance against the defender in the consistorial judicature there; and she could not apply for a divorce to Parliament, at least without a previous judgment of a court of law. Thus the elopement and flight of the defender to this country, one of the very wrongs of which the pursuer complained, obliged her to resort to this tribunal, as the only court where a remedy could be given while her husband remained in Scotland. It was evident, too, that he might remain here all his life if he chose, for there was no power to send him back to England in order to meet her claims. These, too, he might always have the same motives to avoid which were now imputed to him.

Refusal to entertain a cause of this description would even place a very considerable part of the ordinary population of this kingdom entirely beyond the reach of the law, as to conjugal duties and wrongs. The English and Irish, by the several treaties of union, enter Scotland as citizens at their pleasure. Great numbers of the latter, especially, settle permanently here after they have married in their native country under the English law. In this situation, are they to be amenable neither to the consistorial jurisdiction they have left, nor to that under which they have placed themselves? That proposition cannot be maintained, for such a rule would evidently produce the greatest evils and

(a) Ersk. Inst. b. i. tit. ii. § 16.

disorder in society at large. Competency then must exist here to afford redress for all conjugal wrongs, when jurisdiction arises from convening the party *in judicio*; and in this instance the defender has been regularly convened, and the wrongs alleged are of the most aggravated kind.

The plea, that, nevertheless, it is incompetent to give divorce *a vinculo* of an English marriage, and that the action falls to be dismissed, because this happens to be the only remedy now sought, seems not to be a *preliminary* point affecting the *jurisdiction*, but one upon the relevancy of the grounds alleged to support the conclusion of the libel to this extent on the merits of the cause. That conclusion is for dissolution of an English marriage by decree of the Consistorial Court of Scotland. The objection is, that a marriage celebrated under the English law is indissoluble by judicial sentence in England, and must on that account also be indissoluble in Scotland. But even upon the first branch of this proposition, there is hitherto little information to be found in the record. The second involves points of the utmost difficulty, some of which cannot be solved without previously ascertaining whether, in fact, the defender really has made this country his domicile. But the precise state of the fact upon this head can only be ascertained by a proof. That proof, however, may be taken "*before answer*," (a) as not proceeding upon an interlocutor which has decided the relevancy, but as preparing the materials for judgment on that head.

If it is certain that the English rule of law in no case permits dissolution of a marriage by sentence of any ordinary judicature, it is also certain that the English marriages may be dissolved by Parliamentary divorce; consequently, that remedy cannot be regarded as inconsistent with the principles of justice and expediency recognised in the municipal system of England. But the cognizance of the English law is excluded, and that of the law of Scotland cannot be refused as to the wrong committed by the defender, and as to the redress to which the pursuer has right, because he is at present under the jurisdiction of the latter, and not of the former. The only remaining question, therefore, seems to be, Whether the municipal rule of the English law, or the opposite one of the Scotch system, should be followed in disposing of the action?

Although the former of these rules should be adopted, perhaps, suitable redress might be afforded to the pursuer in this action, yet not to the extent that she now insisted. It was the duty of the Court, therefore, to ascertain which of these rules they should prefer, and then to allow her to try to accommodate her claim to that rule, in case it should be requisite to restrict her conclusions. For example, besides his infidelity, as she alleged, her husband had withheld the aliment necessary for her support, and to which she was entitled from him. Could the Judicature of Scotland, even if limited to the remedy of the English law in the matter of divorce, refuse to enforce this right? If it ought not to do so, must it not also afford such redress for every other conjugal wrong as might fall within the same limitation, and which was also competent by our law?

But the previous question was, whether the English rule should be preferred, and this again was settled by the preceding interlocutors in

(a) "Before answer" are the *voces signatæ* used in Scotch judicial proceedings, to intimate that the relevancy is reserved for after discussion.

the cause, to depend upon the quality of the defender's domicile. If that really was Scotch at the date of the action, would it not follow, that this country was also the true *situs*, or place in which the relation of marriage should be held to subsist between the parties at that date, because the defender was the husband, whose domicile became, by legal inference, that of his wife also? This matter of fact could only be cleared by proof, unless the pursuer had admitted herself out of Court by the terms of her condescendence. That she did so, however, should not be rashly assumed. For it was often extremely difficult, especially between countries of the same state, governed by different laws, to decide whether a change of domicile had taken place as to their subjects or not. A judgment could only be formed from the whole circumstances of each particular case, in an action of divorce, just as in a question of intestate personal succession. Without further inquiry, could it then be taken, as established from the showing of the condescendence, that if the defender had died here at the date of the action, such succession to him must nevertheless have been disposed of by the rule of the English law?

There was indeed too much reason to apprehend collusion of English parties in actions of divorce, and as to the establishment of a domicile, as well as with respect to the procedure. (a) Injury to morals, reproach to our law, and oppression, as well as obloquy to the judicature which must administer that law, were the evident consequences which must follow from the influx of parties from other countries, to obtain dissolution of marriage here, in opposition to the rule of their own law. If decrees should be obtained by them, which might be afterwards held invalid by the Courts to which such parties were properly subject, the most distressing collision must arise, and the greatest uncertainty and danger to children of subsequent marriages, as to the rights of legitimacy and succession, as well as to the persons contracting such new relations. But, nevertheless, it was necessary to proceed with the utmost caution, and step by step. For, upon the other hand, it was also clear, that the utmost disorder would follow from declining jurisdiction generally in this tribunal, because the parties had been married in another place, where the contract was indissoluble by judicial sentence, or from refusing even in that case to exercise the jurisdiction, so as to afford such redress here as might correspond with the conditions of the contract, and with the principles of international law.

It could not be taken for granted, that the conditions of her English marriage altogether excluded the pursuer from redress in Scotland, or even from divorce *a vinculo matrimonii* in this country, upon establishment of a domicile here. The municipal law in both countries did indeed provide the different remedies for the case of infidelity, which were allowed in each. While the spouses continued within the same territory where they married, they could therefore only look to the rule of municipal law, which prevailed in that place. But if they might emigrate, and become citizens of another country, governed by a different municipal law, in that event, they would just as naturally look to the new municipal system for the rule. Upon no other principle than this could parties proceed rationally, if they formed any agreement or stipulation upon the subject in contracting marriage. Nay, it was

even clear, that, in the case of an absolute and total change of domicile and country, the connexion with the place of the marriage, and with the law of that territory, would be dissolved entirely, and a new connexion would be formed exclusively with the new country and law of which the parties became subjects. In that event, there could not be any collision, or any just ground for referring them back to the municipal system, their subjection to which, according to this hypothesis, had altogether ceased.

Thus, the question again reverted to the point of fact, where the domicile of the defender truly was at the date of the action, which, consequently, in every view, there must be jurisdiction and competency to investigate.

The judgment of the Court [Sept. 6, 1811,] was "In respect the pursuer and defender are English, and never cohabited as husband and wife in Scotland, and that there are no sufficient circumstances stated to prove or render it presumable that the defender has taken up a fixed and permanent residence in this country, Find, that the Court has no jurisdiction in the present instance; therefore, dismiss the present action, and decern."

A bill of advocacy having been presented *ex parte* to the Superior Court, for the purpose of bringing this judgment under review, Lord Meadowbank, Ordinary, pronounced this interlocutor: "Having considered this bill, and the proceedings before the Commissaries, and been attended by counsel for the parties, according to the order of the 9th current, who declared that they could not explain to the Lord Ordinary, from the discussions or deliberations in the Commissary Court, the grounds of the interlocutor under review, further than appears from the terms in which it is conceived; (a) and the counsel for the defender having signified that he had not advised his client to litigate in support of that interlocutor, and being, in that manner, left to his own unaided consideration of what might be said in behalf of the interlocutor, but having formed his opinion thereon, refuses the bill; and remits to the Commissaries, with this instruction, to find that the relation of husband and wife is a relation acknowledged *jure gentium*. That the duties, obligations, and rights to redress wrongs incident to that relation, as recognized by the law of Scotland, attach on all married persons living within the territory subject to that law, wheresoever their marriage may have been celebrated; or been followed by cohabitation. That jurisdiction, or the right and duty of the courts of this country to administer justice, in such matters, over persons not natural born subjects of Scotland, arises from the person sued being resident within their territory at the time of their citation and compareance, or being duly domiciled, and being properly cited accordingly, at the instance of a person having sufficient interest and title, and proceeding in due form of law; and that, in this case, the pursuer had condescended sufficiently on the defender's residence in Scotland, to enable her to institute her claim, in justice, against him before the Commissaries, according to the dictates of the law of Scotland, in the matter libelled; and, therefore, to recal the interlocutor complained of, to sustain their jurisdiction, and thereafter to proceed in common form, as to them may seem just."

His Lordship also explained the principles of this decision by the following note:

“Had I been able to discover in this and a similar case any thing, as far as now under review, which appeared to me at all doubtful in legal principle, I should certainly have taken the cases to report to the Division. For, unquestionably, the point at issue is one near the very sources of general jurisprudence; and, therefore, reaching to consequences of incalculable number and magnitude. But having been unsuccessful in the pursuit of a doubt, it appeared to me unbecoming and inexpedient to take any steps that implied a doubt to exist in a matter of so much importance; and that my duty was to record my opinion, as clearly as I could, with suitable succinctness, and leave it to its fate.

“The interlocutor complained of seems to hold that the Scotch courts have no right to take cognizance of the conduct of foreigners in Scotland, respecting the relation of husband and wife, unless they have acquired a domicile in Scotland *animo remanendi* there. But it is thought no warrant whatever can be produced for such a doctrine. Foreigners, equally with natives, are subjects to his Majesty, and to the law while here, and of course under the protection of law. And those relations in which they stand towards one another, and which have been duly constituted before they came here, if relations recognized by all civilized nations, must be observed, and the obligations created by them fulfilled, agreeably to the dictates of the law of Scotland. If the law refused to apply its rules to the relations of husband and wife, parent and child, master and servant, among foreigners in this country, Scotland could not be deemed a civilized country, as thereby it would permit a numerous description of persons to traverse it, and violate, with utter impunity, all the obligations on which the principal comforts of domestic life depend. If it assumed jurisdiction in such cases contrary to the dictate of the interlocutor, but applied not to its own rules, but the rules of the law of the foreign country where the relation had been created, the supremacy of the law of Scotland, within its own territories, would be compromised, its arrangements for domestic comfort violated, confounded, and perplexed, and powers of foreign courts, unknown to our law and constitution, usurped and exercised.

“And though, according to the implied doctrine of the interlocutor, foreigners, by a permanent residence, were to have the rights belonging to them, under those domestic relations, protected by the law of Scotland, still a great proportion of persons would, according to that doctrine, remain without law in this matter. If they kept changing their dwellings sufficiently often, they might remain, like the gypsies of former times, at full liberty each to do that which was good in his own eyes.

“But it is thought the establishment of a domicile has no sort of connexion with either the obligation to fulfil the obligatory duties of the domestic relations, or the competency of enforcing it. A person, the instant he sets his foot in Scotland, is as much bound to maintain his wife and child as after forty days residence there; and if he turned them out of doors destitute the first day he arrived, he is unquestionably as liable to be sued for aliment, adherence, &c. as if he had committed this outrage and resided forty days in one house. If not found in person to receive a citation, a domicile is of consequence; but it is of no consequence in such a case, if the foreigner is cited in person, or his residence is sufficiently ascertained. The *animus remanendi* may be of great conse-

quence to establish the presumptions on which the distribution of succession in moveables is supposed to depend; but it does not seem to enter into the constitution of a domicil for citation by forty days residence, nor form any requisite for the validity of a personal citation to an action for obtaining redress of civil wrongs, more than for punishment of a crime. Nor can those suits for redress, which involve *quæstiones status*, admit of any different consideration. In all cases where the *status* claimed or decerned is *juris gentium*, the competency of trying such, wherever the person concerned is found, is obviously necessary. The domestic relations concern so much the most immediate comforts of life, and the well-being of society, that where the parties concerned are present, it is impossible to leave to the Greek calends, as the interlocutor complained of does, the trying of them, without incurring the obloquy of a *denegatio justitiæ*.

“ But though the jurisdiction seems in all views to be unquestionable, the title to sue must, in all cases like the present, be cleared of the legal suspicion of collusion; and I am apt to think that a suspicion of a private purpose in the parties to avail themselves of the law of Scotland, in obtaining its remedies, where the marriage law is violated, instead of contenting themselves with the law and remedies of their own country, may have had some influence in dictating the interlocutor. But if there is any thing in this, it ought to be considered and sifted in discussing the title of the pursuer, whether fair and good, and the relevancy or sufficiency of her allegations of the defender's wrongs. The plain principles on which what is called collusion vitiates a title to sue is, that the pursuer has rendered herself participant of the wrongs she complains of, by instigating it, or connivance with the perpetration of it, for the sake of the remedy she seeks after, or some bye purpose. In this view, it is obvious, that though a married person should commit adultery in Scotland, in a way and manner calculated for detection by the innocent party, from the private expectation [that such party would thereby be induced to seek the legal remedy of divorce, this could form no sort of objection to the title and interest of the innocent party to demand that remedy. Such party uses his own right in demanding it; and is entitled to maintain, that it is nothing against that right how many bye or unjustifiable motives may have concurred in instigating the commission of the injury, provided the sufferer is innocent of all participation in prompting it, or conniving at it. Hence no investigation of such bye or unjustifiable motives on the mind of the wrong doer has ever been carried on *ex officio judicis*, or otherwise, in the Commissary Court. And it is obvious, that the availing one's self of the wrong, and of the publicity attending the commission of it, to obtain the redress allowed by the law, can create or infer no participation in those motives in the wrong doer. Innocence of the instigation or perpetration is sufficient, however strongly the desire of the legal redress, or the determination to take that advantage of the wrong suffered, may be entertained.

“ Now, if this is the case as to natives, it is obvious that foreigners cannot be in a less favourable situation. The purpose of the foreigner in choosing Scotland as the scene for the violation of his marriage vows, cannot disable the innocent party from claiming that redress which the law of Scotland affords for such a wrong. Such party having neither suggested the measure, nor furnished the means of perpetration, nor refrained from using means to prevent it, may surely, with a pure and

good conscience, claim the redress afforded by law, though more ample than that afforded by the law of his own country, and of course more desired.

“But it has been said, with respect to the Gretna Green marriages, that there both parties concur in evading or defeating the law of their country with respect to marriage; and the same, perhaps, may be said here as to evading or defeating the law of England, which confines divorce to those that can pay for the expense of an act of Parliament. This argument, however, though originating from a doubt thrown out in a most respectable quarter, could not stand the investigation it afterwards received. If persons have the free choice of the place where they reside or travel, or perform any act, they are guilty of no fraud against the law of their own country, when they avail themselves of an opportunity of going to another civilized country to constitute the relation of husband and wife, in the manner and according to the rights allowed to persons the subjects of that country; all that such persons do is, to prefer in this matter the law of Scotland to the law of England; and in so doing they do no wrong; they merely *utuntur jure suo*; and, accordingly, this is now the settled law of England, which, by the bye, proves that no domicile is required to constitute in Scotland the relation of husband and wife among foreigners, who have just arrived there before celebrating their marriage, and which, nevertheless, is adjudged to be good and effectual all the world over. But if this is the case in the constitution of marriage, it is obvious that the guilty party's choice of Scotland for the scene of his guilt, because he may have preferred subjecting himself to the redress that law affords for it, to what is afforded by the law of his own country, can never contaminate the rights of the innocent party to demand that redress. The innocent party neither chooses the country for the guilt, nor instigates the commission of it, but merely uses his own right in obtaining the redress that the conduct of the guilty person, under all its circumstances, entitles him to demand. This, therefore, implies no selection of the place for the commission of the guilt in the innocent party, who merely exacts what of right belongs to him; whereas, in the Gretna Green marriage, both parties concur in selecting Scotland in preference to their own country, and so creating a relation between them which that law would not permit. If there was any *fraus legis*, therefore, in the case, both are guilty of it. But here the circumstance of the wrong-doer's committing the wrong from two bad motives (supposing it to be a *fraus legis* that dictated the selection of Scotland) does not vitiate the right of the innocent to take his redress, such as circumstances in which he had no instrumentality afford. I do not think, however, that the selection of Scotland for such a purpose is a *fraus legis*. It is the doing a lawful act from a criminal motive of instigating his innocent party to divorce him, and is so far in him vitious, and he cannot plead it. But the law of England is not defrauded. It nowhere enjoins that the violation of the marriage vow shall not dissolve the relation. It only does not entrust the power of declaring it dissolved to any ordinary court of justice, but reserves it to the legislature. There does not appear, therefore, to be the slightest ground of imputing impropriety to the innocent party, who demands that redress here which the legislature in England affords, and which the law of England nowhere reprobates as unjust or indecorous.”

In consequence of the imperative remit from the Court of Review,

which left no room for the exercise of discretion, the Commissaries, accordingly, in obedience thereto, altered their judgment. A proof was thereafter allowed in the ordinary course, and the allegations of the pursuer being satisfactorily established, decree of divorce *a vinculo matrimonii* was given in common form.

JANE DUNTZE or LEVETT v. PHILIP STIMPSON LEVETT.(a)—p. 38.

[December 21, 1816.]

IN this case the parties were English. The defender did not enter appearance, and the Commissaries appointed the pursuer (2d December 1814) “to give in an articulate condescendence of the facts she avers relative to the contract of marriage betwixt the parties, and the defender’s domicil in Scotland.”

As to the first of these points of fact, she stated in her condescendence, “That the parties were regularly married, of this date, (28th July 1802,) in the parish of St. Mary-la-bone, in the county of Middlesex, according to the forms adopted in the Church of England, &c. 2d, That the parties continued to cohabit together till the month of October 1810. At that time the pursuer’s husband, Mr. Levett, deserted his house at Greenwich, where he had been residing with the pursuer, and went to London,” &c.; and “he took up his residence in the Temple Coffee-house, and continued to live there for about 14 months.”

As to the second, she alleged, that, “The defender, of this date, (February 1813,) came to Scotland, and has continued in this country ever since. He resided in the town of Dunse, in Berwickshire, from the beginning of March till August 1813. He then removed to Coldstream, in the same county, where he continued till July 1814. He then removed to the city of Edinburgh, where he has since resided. From the time the defender came to Scotland, he cohabited with a woman named Elizabeth Osborn, whom he described to the public as his wife, and he still continues to cohabit with her, and to give her that untrue designation. Since the month of February, 1813, the defender has had no lodging or dwelling-house of any kind or description whatever, or place of business in England, and no one circumstance indicates an intention on his part to return thither,” &c.

Upon consideration of this pleading, *ex parte*, two of the four Judges

(a) The first case which occurred after the remit from the House of Lords in the appeal of Tovey against Lindsay, was that of Gordon against Pye. By the judgment of the Primary Court in that case, the *lex loci contractus* was preferred as the rule of decision. But although it was submitted to review, the Lord Ordinary did not take it to report; consequently, the opinion of whole Court of Review was not obtained. For that reason, according to the plan of this compilation, the case of Gordon against Pye could not be selected for reporting. But in fairness to the view of the question which was then taken by the majority in the Primary Court, the present case of Levett, which did obtain the review of the whole Court of Session, and is reported also in the Collection for the Faculty, has been placed before that of Edmonstone. In this latter case of Edmondstone, the argument for the law of the domicil will be found as it occurred to two Judges of the Primary Court. An abstract of the case of Gordon against Pye, with the notes of the opinions of the Judges in favour of the law of the contract, is also given in the Appendix, Note A.

were of opinion, that the action ought to be dismissed, not only because the marriage had been celebrated in England, but because the parties had their real domicil in that country; and, therefore, in every view, the law of England should be adopted as the rule of decision.

The first point, they observed, was the competency of the Court in respect of jurisdiction, and here there could be no doubt. The pursuer had unquestionable right to sue, (if cleared of the legal suspicion of collusion) and the defender, besides being personally cited, had acquired a domicil, which was sufficient for the purpose of convening him *in judicio*. For although a short, perhaps momentary, presence within the territory of the Judge, could never be sufficient to furnish the rule of law, by which a question affecting the *status personarum* ought to be determined; yet to the extent of citation and convention *in judicio*, it was enough.

But however clear the point of jurisdiction might be, it was by no means so obvious by what rule the judicature was to be guided. Here, indeed, lay all the difficulty of a question, which, when viewed practically, involved the most perplexing consequences.

There exists a radical difference betwixt the municipal law of England and that of Scotland as to marriage and divorce. To trace the history of this difference is unnecessary. It is sufficient merely to state the fact, that in England marriage is indissoluble by judicial sentence, while, by the law of Scotland, divorce *a vinculo matrimonii* on the ground of adultery is permitted. The question thus arises, By which of these systems is the present case to be ruled? Whether by the law of Scotland, which, by the pursuer, is assumed to be the *locus domicilii*, or by the law of England, which is confessedly the *locus contractus*?

Some difficulties may be removed, by considering the precise nature and object of the action of divorce, as entertained in this Court; and, in particular, whether divorce is not purely a civil remedy *ad privatum effectum*, or, whether it does not in some degree partake of the nature of a criminal suit *ad vindictam publicam*. To ascertain how the rule stands here with precision is the more material, because, in the previous discussions upon similar cases, there has existed a considerable degree of misconception, in consequence of not distinguishing sufficiently betwixt the criminal act of adultery and the civil remedy which it affords.

There is, however, no distinction better known than that which exists between civil and criminal law, and between criminal prosecutions and civil actions. The same facts may, indeed, be made the grounds either of criminal or of civil prosecutions, and even of both at the same time. But criminal actions differ completely from civil, as well in their form and object, as in the principles by which they are regulated. Facts are tried criminally in the proper criminal courts at the suit of a public prosecutor, to satisfy the ends of public justice, and by principles of law and rules of procedure, which are strictly municipal and local. Civil actions, on the other hand, are brought into the civil courts by the private party for his own redress or indemnification; and more enlarged principles of jurisprudence, founded in considerations of equity and general expediency, may be applied to them.

Accordingly, by the law of this country, adultery may be made either the foundation of a criminal charge *ad vindictam publicam*, or of a civil remedy to the private party who has been injured.

But, with adultery, considered as a crime, or with a view to its pun-

ishment, it is certain that this Consistorial Court has no manner of concern. It is only as the ground of a civil remedy, and of a civil action betwixt the private parties, that this Court can take cognizance of the crime of adultery. The action of divorce, as entertained here, in a word, is purely civil. It no doubt draws after it the forfeiture of the personal *status* of one, and to some extent of both the parties. But actions only in this sense penal, in our system of jurisprudence, were never placed under the head of criminal law. It originates also in a criminal act, and the concurrence of the fiscal is required to the summons; but this circumstance, in a question betwixt the husband and wife, does not affect the civil quality of the action, more especially as there is no conclusion either for a fine or for damages. (a)

In many cases, too, the civil courts are called upon to try incidentally facts of a criminal description, when pursued merely *ad civilem effectum*. Thus, in the case of assyhtment, the fact of murder may be tried incidentally by the Court of Session. Thus, again, in civil cases, the right of peerage may be discussed in ascertaining the validity of a freehold qualification. (b) In like manner, the crime of adultery is tried incidentally in this Court, as the ground upon which, if the adultery is proved, the consequent decree of divorce is to proceed, as the mode of redress to the private party who complains.

The right of divorce, it will also be observed, may be prosecuted here, upon proof of adultery committed in any foreign country. An English party may thus sue for divorce here, upon acts of adultery committed in England as well as in Scotland. The *locus delicti*, while in the criminal prosecution for adultery it is every thing, is, therefore, in the civil action of divorce, really nothing. This circumstance, that it is even perfectly immaterial to the merits of the Consistorial process, where the adultery has been committed, does, of itself, clearly show the legal character of the suit for divorce, and ranks it, with complete certainty, in the class of civil causes.

Beyond what is necessary for explicating its own authority, it is also certain that the Consistorial Court possesses no criminal jurisdiction whatever, and in its institution, object, and forms of procedure, is absolutely civil. This, accordingly, is the view taken of it by Dirleton, a name of great and acknowledged authority in any question of Scottish jurisprudence, and more especially in a question regarding the constitution or jurisdiction of this Court, in which, for many years, he filled, with much ability, the situation of a judge. "Commissariots," he distinctly observes, "are acknowledged to be merely civil, because summons are direct by the Commissaries under the Signet of Office, bearing his Majesty's name and arms; the certification is civil; witnesses are

(a) From the date of the institution of the Consistorial Court, till the year 1785, the Judges and all the other officers of Court had no fixed salaries, and they were paid by fees. In actions of divorce, particularly, considerable fees were levied under the denominations of consignation and sentence money. It was the duty of the Procurator-fiscal to attend to the exaction of these, in which he also had a personal interest. In the Spiritual Court, it had likewise been the province of that officer to prosecute for ecclesiastical censures, when the crime of adultery might be detected; and, after the Reformation, he was the natural informer of the Lord Advocate, as criminal prosecutor for the public.

(b) Sir William Dunbar and others against Sir James Sinclair, Feb. 2, 1790.—*Fac. Coll.*

summoned under civil and pecunial pains; and letters are directed for compelling them to compear, under the pain of horning; the execution of sentences is civil, by poinding or comprising for liquidate sums; or by a charge to fulfil what is *ex facto* upon the Commissary's precept; or, by a charge of horning upon the letters, and by intenting action of deforcement before the Commissaries or the Lords of Session."

The *criterion* arising from the forms of procedure to which this eminent Judge refers, will appear to be supported by all the other qualities of this particular class of Consistorial causes, which are afterwards to be considered.

Keeping these observations in view, the general question to be now discussed is, Whether the law of the domicil should prevail in opposition to the law of the contract? The pursuer contends that it should, and, in effect, maintains, that in cases of divorce, neither the private agreement of the parties themselves, nor the law of the country in which the relation of marriage was constituted, can control or stand in the way of the law of the defender's domicil at the date of his citation. But it is necessary, before coming to a conclusion so extremely important, in the *first* place, to ascertain, with precision, what species of domicil this argument requires.

The residence of the defender within this territory, which has been alleged by the pursuer, is of no importance, except as to the point of jurisdiction, and is, in no respect, of a quality upon which she can found a plea, that the law of Scotland, as the *locus domicilii*, should regulate the decision in a question by which his *status* of marriage is affected. It amounts, indeed, to no more than what would have been enough to afford opportunity for a legal citation at his dwelling-place in his personal absence. Accordingly, Mr. Erskine says, in direct terms, as to this constructive domicil, that, "to prevent disputes upon this point, a rule is received by custom, that where one has resided with his family for forty days immediately preceding his citation, is to be deemed his domicil as to the question of jurisdiction." (a) To any further effect, this sort of residence is of no importance. It has not the least resemblance to the real domicil, which furnishes the rule of decision in questions, for example, of intestate personal succession.

This real domicil of a party is defined by Voet, as constituted (b) "in eo scilicet loco in quo larem rerumque ac fortunarum suarum summam constituit unde rursus non sit discessurus si nihil avocet, undeque cum profectus est perigrinari videtur." Her husband, Mr. Levett, by the pursuer's own statement, certainly has not established this kind of domicil in Scotland.

The possession of jurisdiction with which this Court is vested in the present case, by virtue of the defender's citation and residence here, has then, in itself, nothing to found the further pretension, that the peculiar municipal law of this territory should govern in an action like the present. Such a claim is contrary to the principles even of municipal law, adopted in all civilized countries, as to causes and parties that are really foreign.

If the question, By what rule the cause should be determined? were to depend upon the fact where the real domicil of the defender, Mr.

(a) Ersk. Inst. b. i. tit. 2. § 16.

(b) Voet, ad Pand. lib. v. tit. 1. § 42.

Levett, truly was constituted at the date of the action, then, according to the pursuer's own statement in her condescendence, his real domicil would be found to have remained in England. No collision, therefore, could properly arise in this instance between the law of that country and the law of Scotland. In other words, the *lex domicilii* and the *lex loci contractus* are here the same. Had these been at variance, the Court would have to ascertain which, in this situation, ought to be preferred. But if the conclusion which has been drawn as to the defender's real domicil is correct, this point can only be considered here abstractly, and in a hypothetical view, not as the actual case which now stands for judgment.

Supposing, however, the conflict to exist, was it not possible, in the present instance, to reconcile the two opposing principles?

The law of the domicil was confessedly entitled to the very highest consideration, (a) being in truth the main source of all jurisdiction, especially in questions of personal *status*, when constituted by the act of the law, without the intervention of agreement between parties. The rule, in the words of Hertius, is, "Quando lex in personam dirigitur respiciendum, est ad leges illius civitatis quæ personam subjectam habet." But this learned author does not overlook the necessary qualification in the case of a pre-existing contract, and observes, "Addimus tamen limitationem si alteri, v. g. contrahenti cum tali persona jus jam quæsitum sit."

In all cases of *status* arising from marriage, there was a pre-existing contract betwixt the parties, which might found an exception against the influence of the law of the domicil, when, as here, it stood directly opposed. Hence the question came to be considered as one of civil right relative to a contract betwixt two parties, which was foreign to the law of Scotland; and the effect of that contract was the matter at issue. This was a question of international law. The contract here, though sued in a Scottish Court, was an English contract; consequently, to us a matter of foreign law, and to be considered upon those principles of international jurisprudence, according to which, in the ordinary case of civil obligations, our courts of justice every day gave effect to the law of the foreign contract.

As to foreign contracts in general, Lord Dirleton has indeed long since observed, in his Doubts and Questions of Law, under the title "Strangers," "All nations are *municipia*, and the world a great *civitas*. They have that relation and necessitude that *οφείλειαι sunt*, and owe justice to all persons of whatsoever nation, according to the law of the place where they contract. With respect to that place, *sibi enim legem dixerunt*. If justice be refused, *datur remedium pignorationis seu repressaliarum*." And Sir James Stewart, in his answers, remarked, upon this maxim, "'Tis true, by the law of nations, all persons ought to have justice done them against their parties, where they find and attack them; and that this justice should be done in the execution of personal contracts or bargains, according to the law *loci contractus*. But if it tend to affect the lands, or *res immobiles*, where the party convened lives, it must be according to the law of their *situs*."

The principle of our law in such cases, as now thoroughly established, is well defined by Mr. Erskine, the latest institutional writer, who ob-

(a) Voet, de Statutis, § 7, 8, et seq.; Hertius, de Collisione Legum, § 4, 5, in fine, and § 8.

serves, "That all personal obligations or contracts entered into according to the law of the place where they are executed, are deemed as effectual when they come to receive execution in Scotland, as if they had been perfected in Scotland, or according to all the solemnities of the Scotch law." (a) Lord Bankton, too, had observed in particular, that "payment of an English bond may be proved by witnesses, as that law allows, though ours does not, because it is just that the obligation should be dissolved by the rules of the law whereby it is constituted: *Unum quodque eodem modo dissolvitur quo colligatum est.*"

In a case reported by Lord Stair, 28th June 1686, (M'Moreland,) payments made in England were found proveable in the Scotch Court by witnesses, or by the oath of a cedent, against an onerous assignee, according to the law of the sister kingdom, as entitled, in these circumstances, to be preferred to the opposite rule of our own law. By the decision in the case of Mitchell, against Mowat, 11th December 1746, reported by Lord Kilkerran, a Dutch factor's right of retention over goods put into his custody, for security of credit given by him upon these, in the belief that they belonged to the party who lodged them, was sustained here against the true owner, in respect of the custom of Holland, where the transaction took place, although, by the law of Scotland, no such claim could have been admitted. In that of Lawson against Maxwell, 12th February 1784, Fac. Coll. a surgeon was not found to have a preferable right to payment of his account against a patient in London, because this privilege of the Scotch law did not exist at the place of the contract. In the case of Delvalle against the York Buildings Company, Fac. Coll. 9th March 1780, the Court of Session had sustained the objection of the Scotch negative prescription of 40 years, against action upon bonds of that English company. But upon appeal, heard *ex parte*, this judgment was reversed. And in the subsequent case of the same English company against Richard Cheswell and others, 14th February 1792, this objection was again made, and was repelled by the Scotch Court, although the debtors in that case were amenable to the jurisdiction, as proprietors of considerable estates situated in Scotland. In the case of Campbell against Ramsay and Company, decided on the 15th February 1809, Fac. Coll. action was sustained for recovery of interest, at the rate of 8 per cent. upon an obligation granted in India, notwithstanding that the transaction was usurious by our law.

In the ordinary case of civil obligations of a pecuniary nature, the application of the *lex loci contractus* is then undoubted. To the *constitution*, at least, of marriage, considered as a contract, the same rule unquestionably applies; for every one knows, that, by the law of nations, marriage, duly celebrated according to the law of the place, is valid and effectual all the world over. Can a different rule be adopted with consistency as to the *dissolution* of the contract of marriage? Or can the rule as to the dissolution of marriage be modified and controlled by an arbitrary change of domicil at the will of either or both of the parties? The question in each of these aspects must be regarded as one of infinite delicacy, and its importance to the decision of the present cause was evident.

(a) Ersk. Inst. b. iii. t. 2. § 40. Bank. Inst. b. i. t. 1. § 32.

The danger of admitting any arbitrary principle in questions affecting the existence of the conjugal relation, appeared, at first sight, serious and alarming. Marriage itself has a fixed and indelible character. The relation constituted by it is the most sacred and important of all the relations in civil society, and that which it most concerns the citizens of every state should be fixed and determined. But change of residence for a single day might subject the party to a new jurisdiction by personal citation. Or, this consequence might follow from longer residence as a stranger, like that of the defender, Mr. Levett, in Scotland, without any real change of domicil. Even when the new domicil was apparently most permanent and fixed, the inference that a change had really taken place, was but matter of construction from all the circumstances, (a) and was liable to much uncertainty. It was, however, indisputable, that the most important interests of the parties, of their children, and of society at large, depended upon the security of the conjugal relation. Hence the necessity of resorting to some principle less dangerous in its consequences to the sacred bond of marriage.

In all respects, the law of the contract was free from these objections, and might be adopted, at least, with safety to the indelible nature of the contract and relation of marriage. In the case of the relation constituted by marriage, it appeared even more necessary than in any other case whatever, that the principle of concession by one foreign state to another should be allowed to operate. The mode of constituting the relation is accordingly received, as well as the relation itself, and, in consistency, the modifications established by the law of the place of celebration ought likewise to be admitted. By analogy, at least, it is clear, that the principle of *comitas*, when adopted, should be extended thus far. The established doctrine upon the point also corresponds, and is thus expressed by Huber: “Porro non tantum ipsi contractus ipsæque nuptiæ certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam *jura et effecta* contractuum nuptiarumque in iis locis recepta ubique vim suam obtinebunt.” Huber, *De Conflictu Legum*, § 9.

While the law of the contract thus appeared to be the safest rule to follow in such a case, it likewise harmonized finely with the nature of marriage, and with the intention of parties, as appearing on the face of an agreement, by which they voluntarily contracted an indissoluble union, indefeasible by its own nature, and by the law of the country where it was made.

But, assuming that the law of the contract is every where entitled to obedience from consideration of its equity, yet this, like every other general rule, cannot be received without limitation. Wheresoever the foreign law stands opposed to the principles of religion or of morality, or to the municipal institutions established in the country where it is sought to be applied, it must cease to operate. For, it is clearly the first duty of every state, to keep its religion and morals pure, and its institutions entire. This necessary concession, therefore, leads to the important inquiry, Whether there is any thing in the quality of indissolubility attached to marriage by the law of England, either so immoral in itself, or so hostile to established principles and institutions in this country, as to require that it should not be respected here?

(a) Voet, Lib. v. t. 1. § 97.

By the definition of the civil law as to the spouses, the relation of marriage is *conjunctio maris et fœminæ consortium omnis vitæ divinarum humanarumque rerum communicatio*. (a) In its origin, the eminent and enlightened Judge who decided the case of Gordon against Dalrymple, (b) has observed that it is "a contract of natural law. It is the parent, not the child, of civil society. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations, it has the sanction of religion super-added; it then becomes a religious and civil contract, for it is a great mistake to suppose, that because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract; and the consent of the individuals pledged to each other is ratified and confirmed by a vow to God."

The law of Scotland, too, in particular, has ever regarded marriage not merely as a civil contract, the creature of civil society, but as founded in the divine institution. "The first obligations," Lord Stair has observed, b. i. t. 4. p. 1. "put upon man by God, were the conjugal obligations, which arose from the constitution of marriage."

Lord Bankton, tit. 45, b. 4, in his remarks on the rule, *nuptias non concubitus sed consensus facit*, says, "The law before us being from Ulpian, a Gentile lawyer, who did not own marriage to be a divine contract, must hold more strongly in Christian states who regard it as such; and particularly with us marriage is esteemed a divine contract." And Mr. Erskine, lib. 1, tit. 5, observes, that "the character of perpetuity seems to have been impressed on marriage by God himself in its first institution, when he declared the two common parents of all mankind to form one flesh, Gen. ii. 22, *et seq.* which was afterwards improved by our Saviour's injunction, that no man should put asunder whom God had joined; Matt. xix. 6." It is "for these reasons," he concludes, "marriage cannot, by the usage of Scotland, be dissolved till death, except by divorce, proceeding either upon the head of adultery, Matt. xix. 8, 9; Mark x. 2, or of wilful desertion; 1 Cor. vii. 15."

These views perfectly accord with the more ancient regulations of the canon law before it converted marriage into a sacrament. The doctrines of that code, while not infected by the corruptions to which the Council of Trent gave its sanction, have likewise, since the date of the Reformation, continued under various modifications to be the acknowledged basis of the matrimonial law in all the Protestant states of Europe. As to Scotland, within half a century after the date of the Reformation, Sir Thomas Craig, B. ii. dieg. 18. s. 17. observed, "*Totam hanc quæstionem pendere a jure Pontificio*." Hence, although the idea of a sacrament in marriage and the quality of indissolubility, are in our municipal institutions alike disregarded, nevertheless, in strict conformity to the decretals and other books of the more ancient canon law, we still reverence marriage as being of divine institution, and regard its obligations as sacred and irrevocable.

The genius and tendency of the law of Scotland, as well as of England, are therefore clearly in favour of the perpetuity of marriage. The for-

(a) Voet, ad Pand. lib. xxiii. tit. 2. § 1.

(b) Dodson's Rep. of Sir William Scott's judgment in the case of Dalrymple.

mer as well as the latter encourages adherence to the contract, and discourages its dissolution. Every facility is afforded towards entering into the married state. Suspicion and alarm watch every step to dissolve it. For upon the security of that relation between the parents, the legitimacy of their offspring, with every consequence attached to that character in society, must depend. "*Solutionem matrimonii difficiliorem. debere esse favor imperat liberorum,*" (L. 8. Cod. de Repud.) was the maxim even of the Roman Code, as it is unquestionably of our own. This is manifest from the principle which governs the whole procedure in consistorial causes, under the law of Scotland. A jealous disregard prevails of every admission made by a party who is suspected of collusion; no judgment passes by default without proof; and if the defender declines to appear, the Judges are nevertheless bound to proceed in the investigation and discussion of the merits, just in the same manner as if he were present, and had maintained the keenest opposition. In the same spirit every objection against the suit which presents itself to support the marriage, must be carefully weighed. Not only collusion between the parties, but *dissimulatio injuriæ*, or *remissio injuriæ* and *lenocinium*, as personal bars, are relevant exceptions to the action of divorce. In cases where the injured spouse has, by affording any of these exceptions, forfeited the remedy of divorce, and in all the more numerous cases where the right to dissolve the marriage is not prosecuted at all, or not to the length of final decree, the consistorial law itself never interferes between the parties, however flagrant the adultery.

Thus, it appears, that there is nothing in our own system which should prevent us from respecting the quality of an English marriage, that it is indissoluble. It is not immoral to hold, that marriage should not be dissolved on account of adultery, for the characteristic feature of the conjugal relation, even in this country, is its permanency. So it has been viewed by Stair, Bankton, and Erskine, and though, in certain cases, the dissolution of the marriage union is *permitted*, yet it is in no slight degree important to this view of the case, that the law of divorce is here barely *permissive*, not *imperative*.

It is upon the same principle, that the right of divorce is regarded in the law of Scotland as a mere personal cause of complaint, in which no third party, and not even the public, can be permitted to interfere. If not claimed by the innocent spouse, or if abandoned before obtaining a decree, the marriage, by the law of Scotland, is not affected by this right of divorce, and continues to subsist, with all the rights and privileges attached to it, just in the same manner as if the adultery had never been committed. In these respects, too, our rule is in unison with the general principle on which the law of divorce rests in other nations. (a) In a word, there cannot be a doubt, that divorce for adultery is, in every view of the subject, matter purely of private right, the exercise of which is not enjoined, but merely permitted, even by those peculiar rules of municipal law, which, in Scotland, and in some other Protestant States, allow the injured spouse to sue for dissolution of the marriage on that ground.

Neither is it necessary, in order to punish the guilty, or to prevent the prevalence of the crime in this country, that divorce should in any case follow, because adultery has been committed by a foreigner in Scotland.

(a) L'Esprit des Loix, cap. iii. lib. 26.

In our criminal code, that offence still ranks in the list of crimes which may be prosecuted at the public instance before the Criminal Courts.<sup>(a)</sup> The statute appointing a capital punishment, when it is flagrant,<sup>(b)</sup> is understood to be in desuetude. But the inferior punishments are still competent. Foreigners, and also our fellow-subjects of the sister kingdoms, are liable, in the same manner as natives of Scotland, to be brought to trial and punishment for the crime of adultery, just as for other delinquencies committed within this territory. But if this crime had been altogether overlooked by the penal law, the circumstance could afford no pretence for mingling considerations of criminal law with the cognizance of the civil action of divorce between private parties. Indeed, if the complete separation between these two perfectly distinct departments shall be lost sight of, it is obvious, that the subject can no longer be investigated with accuracy in any case, or so as to lead to a rational conclusion.

It is equally clear, that the sovereignty and independence of the law of Scotland can be in no degree affected by following the rule of their own contract, in deciding cases like the present, between the citizens of another country who have become subject to this jurisdiction. Indeed, if it were to follow, as a necessary consequence, from the possession of jurisdiction here, that the law of Scotland must also furnish the rule of decision, international law must be altogether disregarded. But, in Scotland, the *jus gentium* is acknowledged, as it is in all other civilized countries. According to its dictates, the foreign law confessedly regulates here in questions relative to all other foreign civil contracts, excepting marriage. It is, therefore, next to be carefully considered, whether this particular contract has not likewise the common claims, at least, if not peculiar and stronger claims to respect, *according to the principle of international law* which regulates.

*Comitas* is the term used to express the principle upon which courts of independent countries, in deciding questions upon foreign contracts, adopt the rule of the foreign law, under which the contract was made. This concession, however, is not a duty of obedience, but merely a debt of justice. Still it cannot be lawfully refused, unless where it would be attended with injurious consequences. In other words, the ultimate question here is one of legal expediency; and, in the language of the civilians, *comitas* is only to be observed, “*quatenus sine præjudicio indulgentium fieri potest.*”<sup>(c)</sup>

Into this final issue the whole discussion then resolves. But, before any opinion can be formed in this instance, it is necessary to ascertain, with precision, what is the nature and amount of the acknowledged difference between the English and Scotch laws. The engagements of perpetual fidelity, and inseparable union, which the spouses pledge to each other during their joint lives, are as little qualified, by any exception in favour of divorce for adultery in the ritual of marriage, under the one of these laws as under the other. It cannot, therefore, be said, that the municipal laws of the two kingdoms are at variance in their abstract and general principles. But if the municipal laws of the two countries could not be reconciled, and if our own did not admit of this accommo-

(a) Hume's Com. Vol. IV. p. 302.

(b) Notour, in the language of the Scotch law.

(c) Hertius, De Collisione Legum, Vattel, p. 6, § 14, 16.

mer as well as the latter encourages adherence to the contract, encourages its dissolution. Every facility is afforded to dissolve it. Suspicion and alarm watch the security of that relation between the legitimacy of their offspring, with every consequence to the character in society, must depend. "*Solutio matrimonii debere esse favor imperat liberorum*" was the maxim even of the Roman Code, and is now the maxim of our own. This is manifest from the principle of the procedure in consistorial causes, under the law of the British empire, regard prevails of every admission made by the parties, and no judgment passes by default; if the defendant declines to appear, the Judge proceeds in the investigation and discussion of the case as if he were present, and he is bound to find a ground of divorce. In the same spirit every objection to support the marriage, must be supported by each other, and at variance. The law of the French revolution, as to certain classes, in-  
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*six weeks absence is a sufficient ground for*  
*colonies throughout the world follow each*  
*to which they belong. Indeed, quotations from*  
*that perfect agreement between any two of these*  
*of the remedy to be afforded for conjugal wrongs,*  
 Thus, it appears, extremely rare, and that there is scarcely any other should prevent us. Unbounded freedom of judgment has been exercised that it is indissoluble. Every person, *sui juris*, may, however, in order not to be dissolved, move from one domicile to another; as he thinks fit. Can the conjugal relation be expedient or just, that by such change of place, one of has been violated without the consent of the other, should have power to alter-  
*tain cases,*  
*in no slight degree?*  
*divorce*  
 It is either by the contract of the parties, or by the law under which their union takes place, could be secure from alteration at the instance of the husband. Total insecurity to the most important interests of the other spouse, and of the children, must follow. Nor would it stop here; for the law of the contract does not yield, and may, within its own territory, maintain the essential conditions of that contract, as indefeasible against the decisions of every foreign tribunal to which the parties may become amenable. Yet each sentence of divorce pronounced it, for the parties to marry anew with other individuals. Hence, these new connexions will be lawful in one country, as founded upon the most sacred of contracts, and in the neighbouring country will be crimes calling for degradation and severe punishment. The children of these will be legitimate, and entitled to succeed to all inheritance of honour or estate in the one, and bastards incapable of legal succession in the other. In other words, a rule so inexpedient and unjust, must produce great confusion and distress if it shall prevail in any country of the civilized world: but to a degree infinitely aggravated, where opposite laws with regard to the dissolubility of marriage by judicial sentence exist in different realms of the same state, the nations of which form one people, as in Great Britain.

in no respect inconsistent with the admission, that action of divorce has, in this instance, and will be taken by the Consistorial Court of Scotland, when the matter is brought before it, by citation within the territory. Not distinguishing the *jurisdiction* from the *territory* of every independent municipal state, that this jurisdiction should be exercised without all foreign control, as well as uniformity of acts of every kind, brought under its sway, require that the law of a foreign contract should be applied to actions arising upon that contract between

It is added, that it is nevertheless the paramount interest of a state to maintain an independent system of law, to decide by its own law against strangers, who have become subject to its jurisdiction. In the cases of its own permanent subjects, it is another matter. The sole object of law in the suits of private parties is to do justice between them, and can be attained only in questions arising from contracts, by giving effect to their covenants in these, according to the law in which the parties themselves must be held to have understood such covenants at the time they were entered into; that is to say, according to the plain meaning of their engagements, *et secundum legem loci contractus*. Refusal to discharge this debt of justice, as Dirleton has observed, could only serve to provoke similar iniquity towards our own citizens when found within the territory of the law which had been disregarded, by way of reprisal. The *status* of a stranger, as married or unmarried—divorced *a vinculo matrimonii*, or only separated *a mensa et thoro*, by judicial sentence for adultery, cannot be a matter of any concern to the law of the country, before the tribunal of which he happens to be convened during a transient residence, except as to the duty of the Judges to pronounce a right decision.

The example of the law of England, and the want of *comitas*, which the courts of justice there are said to show towards the municipal system of this country, in not affording to Scotch parties sentence of divorce *a vinculo* of Scotch marriages for adultery, and in not respecting a sentence of divorce pronounced by a Scotch Court *a vinculo* of an English marriage, has likewise been urged as proof, that it would be inexpedient to abandon our own law of divorce to that of England, which will make no concession in return. It is sufficient to reply, that if this charge were well founded, it would not therefore follow, that *comitas* upon our part must be prejudicial to ourselves, and consequently inexpedient. Reprisals and retaliation are extraordinary measures, which independent states may sometimes find reason to adopt, but which are totally foreign to the duties of courts of law. It is only competent for them to consider what is just in each particular case they decide. Thus only can they obtain or merit respect at home or abroad, and it is by the force of reason alone, that the opinions they adopt as to the due operation of international law can be entitled to any weight beyond the limits of their own territory. Even in point of fact, too, it may be presumed, that the assumption is erroneous, that *comitas* towards the Scotch law, and towards the decision of a Scotch Court in this matter, is refused in England. For, as to the remedy of divorce *a vinculo* of a Scotch marriage, power may be wanting to give that remedy to citizens of Scotland in the

FERGUSSON, 63.  
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dition, there is a higher ground upon which the *lex loci contractus* is preferable even to that of the defender's true domicile of residence.

It is evidently most essential, according to every view of public expediency, as well as of justice, between private parties, that of all contracts, that of marriage should have a fixed and indelible character, which it shall not be in the power of the husband to alter at pleasure. But the municipal laws as to divorce, in almost every state, ancient and modern, are peculiar and local. These, too, are sometimes quite opposite, even in neighbouring provinces of the same state. No example can be more striking than that of the three kingdoms of the British empire, in two of which, marriage is indissoluble by judicial sentence, while, in the other, it may be dissolved either for adultery or continued non-adherence, after legal requisition. By the law of the French revolutionary governments, and by the law of Russia, as to certain classes, incompatibility of temper has been made a ground of divorce. In the Netherlands, opposite rules prevail. Those of the several states of Germany are altogether different from each other, and at variance. The municipal systems of the other countries of Europe are equally discordant on this head. In America, while some of the United States follow the English rule; in others, six weeks absence is a sufficient ground for divorce; and the European colonies throughout the world follow each the law of the kingdom to which they belong. Indeed, quotations from each would only prove that perfect agreement between any two of these codes, as to the extent of the remedy to be afforded for conjugal wrongs, if it exists at all, is extremely rare, and that there is scarcely any other point on which such unbounded freedom of judgment has been exercised by each legislature. Every person, *sui juris*, may, however, in ordinary cases, remove from one domicile to another, as he thinks fit. Can it then be either expedient or just, that by such change of place, one of the spouses, without the consent of the other, should have power altogether to subvert one of the most important conditions of the relation between them? Upon that footing no quality, indeed, of marriage, established either by the contract of the parties, or by the law under which their union takes place, could be secure from alteration at the pleasure of the husband. Total insecurity to the most important interests of the other spouse, and of the children, must follow. Nor would the evil stop here; for the law of the contract does not yield, and may, within its own territory, maintain the essential conditions of that contract, as indefeasible against the decisions of every foreign tribunal to which the parties may become amenable. Yet each sentence of divorce *a vinculo*, is a permission and warrant from the authority which pronounces it, for the parties to marry anew with other individuals. Hence, these new connexions will be lawful in one country, as founded upon the most sacred of contracts, and in the neighbouring country will be crimes calling for degradation and severe punishment. The children of these will be legitimate, and entitled to succeed to all inheritance of honour or estate in the one, and bastards incapable of legal succession in the other. In other words, a rule so inexpedient and unjust, must produce great confusion and distress if it shall prevail in any country of the civilized world: but to a degree infinitely aggravated, where opposite laws with regard to the dissolubility of marriage by judicial sentence exist in different realms of the same state, the nations of which form one people, as in Great Britain.

These views are in no respect inconsistent with the admission, that jurisdiction to try the action of divorce has, in this instance, and will always become vested in the Consistorial Court of Scotland, when the defender is regularly convened before it, by citation within the territory. The error and confusion lie in not distinguishing the *jurisdiction* from the *rule of decision*. The sovereignty of every independent municipal system of law, does indeed require that this jurisdiction should be exercised and supported in freedom from all foreign control, as well as universally in all actions upon contracts of every kind, brought under its cognizance. But it does not require that the law of a foreign contract should be disregarded in questions arising upon that contract between citizens of another country.

If it shall still be contended, that it is nevertheless the paramount interest of every sovereign and independent system of law, to decide by its own rules upon actions against strangers, who have become subject to its jurisdiction, as it does in the cases of its own permanent subjects, it is answered, that the sole object of law in the suits of private parties is to do justice between them, and can be attained only in questions arising from their contracts, by giving effect to their covenants in these, according to that sense in which the parties themselves must be held to have understood such covenants at the time they were entered into; that is to say, according to the plain meaning of their engagements, *et secundum legem loci contractus*. Refusal to discharge this debt of justice, as Dirleton has observed, could only serve to provoke similar iniquity towards our own citizens when found within the territory of the law which had been disregarded, by way of reprisal. The *status* of a stranger, as married or unmarried—divorced *a vinculo matrimonii*, or only separated *a mensa et thoro*, by judicial sentence for adultery, cannot be a matter of any concern to the law of the country, before the tribunal of which he happens to be convened during a transient residence, except as to the duty of the Judges to pronounce a right decision.

The example of the law of England, and the want of *comitas*, which the courts of justice there are said to show towards the municipal system of this country, in not affording to Scotch parties sentence of divorce *a vinculo* of Scotch marriages for adultery, and in not respecting a sentence of divorce pronounced by a Scotch Court *a vinculo* of an English marriage, has likewise been urged as proof, that it would be inexpedient to abandon our own law of divorce to that of England, which will make no concession in return. It is sufficient to reply, that if this charge were well founded, it would not therefore follow, that *comitas* upon our part must be prejudicial to ourselves, and consequently inexpedient. Reprisals and retaliation are extraordinary measures, which independent states may sometimes find reason to adopt, but which are totally foreign to the duties of courts of law. It is only competent for them to consider what is just in each particular case they decide. Thus only can they obtain or merit respect at home or abroad, and it is by the force of reason alone, that the opinions they adopt as to the due operation of international law can be entitled to any weight beyond the limits of their own territory. Even in point of fact, too, it may be presumed, that the assumption is erroneous, that *comitas* towards the Scotch law, and towards the decision of a Scotch Court in this matter, is refused in England. For, as to the remedy of divorce *a vinculo* of a Scotch marriage, power may be wanting to give that remedy to citizens of Scotland in the

Court of the sister kingdom, the law of which only authorizes divorce *a mensa et thoro*; because, when this power has not been vested in Judges for any purpose, or in any case, it cannot be assumed by them to accommodate strangers. Application to the Legislature itself for that measure of redress, may consequently, in such circumstances, be the only resource competent. Again, as to the Scotch sentence of divorce, which was not respected by the English Judges in the trial of Lolly for bigamy, it may have been proved, that the decree had been fraudulently and unlawfully obtained by the device of that party, and this decree may therefore have been held to be of no avail to him, or it may have been concluded, that this decree was a nullity, because it set aside a marriage which was incapable of dissolution by judicial sentence. It is likewise to be remembered, that he was tried in a criminal Court for bigamy, and that the decree of this Consistorial Court was a civil sentence. The first hypothesis, as to the reason of disregarding the Scotch divorce, may, therefore, be illustrated by observing, that no judgment of a civil Court, fraudulently obtained, can bar a criminal action. For example, a decree of a competent civil Court, sustaining action for payment of a forged bond, will not, after the crime has been detected, prevent trial and penal conviction in the criminal Court. Upon the other hypothesis, the Scotch decree of divorce, dissolving the relation of husband and wife, constituted by an English marriage, may have appeared in the same light as if it had dissolved the relation of parent and child arising from that union, by judicial sentence, both being equally incapable of dissolution by judicial sentence in the view of the English law. To explain the decisions or principles of the law of England, is not, however, requisite here, if that task could be performed by a Scotch Court. The rule of that system must be considered here only as a fact.

The sole remaining argument upon the head of expediency, maintained by the pursuer, is derived from an assumption, that impunity will induce the profligate among the married people of England and Ireland to take up their residence in this kingdom, for the purpose of forming or preserving adulterous connections beyond the reach of the law. But, it is denied that such impunity can exist. For it is the province of the criminal law to protect the interests of morality and social order against offenders of every description, and it is not to be doubted that any just occasion would again call into activity those penal statutes of our law against adultery, which have not been abrogated by disuse.

It is, at the same time, but too plain, that the dissolution of English marriages, by our divorce for adultery, must operate as a public and general invitation to all the married of the sister kingdoms, who are tired of their union, and profligate in their manners, to come into Scotland and pollute this country with their crimes, for the very purpose of regaining freedom. The records of the Consistorial Court, within these last ten years, afford too much reason for believing, that this danger is not ideal; and it is easy to foresee, that if the practice of granting such divorce in these cases shall be once fully established, the evil must increase to a degree infinitely prejudicial to the purity of morals among the people of Scotland. Thus, in truth, it is not refused, but giving divorce *a vinculo* of English marriages, which must produce serious injury to our own municipal system, and to the moral and social interests of this nation.

Hence, in every view, as well of justice as of expediency, and regarding the present case as a civil question of right between private parties, the decision ought to be given according to the rule of that law by which their rights have been established. By the acknowledged principles of international jurisprudence, the pursuer is, however, entitled to the same remedy she would have obtained from the judicature of her own country, but to nothing more. Separation *a mensa et thoro*, with separate aliment, is understood to be the redress she might have, if the defender were convened there *in judicio*. But for this she does not conclude in the present action, and, therefore, as it now stands, it must be dismissed.

The other two Judges of the Primary Court were also of opinion, that divorce *a vinculo matrimonii* could not be pronounced in this case; but only upon the ground, that the real domicil of the parties appeared from the condescendence of the pursuer to be in England at the date of the action. And a judgment was given in these terms (9th December 1814): “The Commissaries, having considered this condescendence, with the libel and certificate produced, and whole process, in respect that the parties confessedly are English, and the marriage between them was celebrated in England, and that the permanent domicil and true residence of both since their marriage has always been, and now is, in that kingdom: Find, that the alleged commission of adultery by the defender in Scotland, and his residence here, which, by the pursuer’s own statement, appears to be temporary and transient, can have no effect to alter the condition of the marriage between the parties as indissoluble *secundum legem loci contractus*: Therefore, find that this Court cannot pronounce sentence of divorce *a vinculo matrimonii*, in terms of the conclusions of the libel; assoilzie the defender, and decern.”

The case being thereafter submitted to the review of the Superior Court by bill of advocation for the pursuer, this deliverance was given by Lord Reston, Ordinary (6th February 1815): “The Lord Ordinary, on considering this bill and inferior Court process, appoints the bill to be printed, that it may be reported to the Court along with the case of Edmonstone *versus* Lockhart; and also ordains this bill and deliverance to be intimated to the defender.”

Afterwards his Lordship gave this further deliverance and order (11th July 1815): “The Lord Ordinary, having considered this bill, with the proceedings before the Commissaries, and also the bill of advocation for Thomas Stirling Edmonstone, Esq. residing at Moorhouse, near Carnwath, against Mrs. Annabella Lockhart, otherwise Edmonstone, with answers thereto, also the bill of advocation for the Honourable Mrs. Mary Butler, or Forbes, spouse of the Honourable Frederick Augustus Forbes, lately residing in Edinburgh, and Richard Hotchkis and James Tytler, Esqrs. writers to the signet, her attorneys; and having advised with the Lords of the Second Division, before whom and the Lords of the First Division, and the permanent Lords Ordinary of both Divisions, counsel were heard in behalf of the complainer in this bill, and the said other two complainers, and for the said Mrs. Edmonstone, respondent, as one of them, appoints memorials to be lodged, which are to be seen and interchanged, and put into the Lords’ boxes by the second box-day of the ensuing vacation, under an amand of 20*l.* sterling, agreeably to the interlocutor pronounced of this date upon the bill of advocation for

the said Thomas Stirling Edmonstone, which interlocutor is here referred to.”(a)

At the close of the discussions before the whole Court of Session, and in the Second Division of that judicature, this interlocutor was given by Lord Reston (9th March 1816): “The Lord Ordinary, having again considered the bill and procedure, with the condescendence, and advised with the Second Division, and the Court being of opinion that the case ought to be remitted to the Commissaries, with instructions to recal their former interlocutor, and allow further inquiry as to the domicil; but being equally divided in opinion, whether this inquiry should be limited to the domicil of the defender, or extended to that of both parties, supersedes advising the case till May next.”

The opinion of Lord Pitmilley being afterwards obtained, a judgment remitting the cause was then pronounced in these terms (1st June 1816): “The Lord Ordinary, having resumed consideration of this cause, and again advised with the Lords of the Second Division, when Lord Pitmilley was present, remits to the Commissaries to recal their former interlocutor, to allow the pursuer to prove that the defender was domiciled and resident in Scotland when the action was raised, and also to make what inquiry they may think proper and competent, in order to ascertain whether the present process be collusive, and thereafter to proceed according to law.”

In obedience to this remit, the Commissaries (7th June 1816) recalled

(a) The whole proceedings in the Superior Court will be found in the Appendix to this volume; but, for convenience of the reader, the questions put by the Second Division of the Court of Review to the other ten Judges of that Court, and their answers, are also annexed here. These are,

“Is it a valid defence against an action of divorce in Scotland, on account of adultery committed there, that the marriage had been celebrated in England?

“Or, that the parties had been domiciled there, when the marriage had been celebrated in Scotland?

“Or, will it materially affect the defence, that the parties, though married in England, were Scots persons, who had thereafter cohabited in Scotland, and continued domiciled there?

“The ten Judges to whom the above question has been referred, having maturely considered it separately, and having also conversed together on the subject, are unanimously of opinion,

“That it is not a valid defence against an action of divorce in Scotland for adultery committed there, that the marriage had been celebrated in England.

“Nor that the parties had been domiciled there, when the marriage had been celebrated in Scotland.

“And, *lastly*, they are of opinion, where the parties are Scots persons happening to be England when their marriage was celebrated, but who thereafter returned to Scotland, and cohabited and continued domiciled there, that these circumstances can never aid the defence against an action of divorce in Scotland for adultery committed there, on the ground that the marriage had been celebrated in England. On the contrary, they are of opinion, that these circumstances will materially support the plea of the pursuer of the divorce.

“In giving this opinion, they think it necessary to add, that they take it for granted that there is no objection to the jurisdiction of the Court from the want of that residence or domicil in the parties which is necessary to found civil jurisdiction. And also, that there is no proof of collusion between the parties, either by direct evidence or necessarily arising out of the circumstances of the case, as they mean to give their opinion only on the abstract question put to them, and to say that the mere fact of the marriage having been celebrated in England, whether between English or Scots parties, is not *per se* a defence against an action of divorce for adultery committed here.”

their former interlocutor, and proceeded in the action, according to the directions of the Superior Court. At the same time, the case of Edmonstone, referred to in the interlocutors of the Lord Ordinary, was likewise before them by another remit,<sup>(a)</sup> and, in that case, the second Division of the Court of Session, in conformity to the opinion of the other ten Judges, had decided, that it is not a valid defence against an action of divorce in Scotland, for adultery committed there, that the marriage had been celebrated in England.

The proof led by the pursuer, Mrs. Levett, was extremely concise, with respect to the quality of the defender's residence in Scotland, and altogether failed to establish that he had lost his native domicile in England, or acquired a new domicile in this country.

Under the oath of calumny, the pursuer herself was likewise very fully examined as to collusion, and her answers were completely negative of that objection.

In these circumstances, all the Commissaries were of opinion, that the conclusion for divorce *a vinculo matrimonii* could not be sustained, and an interlocutor was therefore now pronounced in the following terms:—July 19, 1816. The Commissaries, having resumed consideration of this process, and having particularly considered the answers made by the pursuer to the questions put to her under the oath of calumny, in obedience to the instructions contained in the last part of the remit from the Superior Court, find, that there is no ground in this case for suspecting any collusion, either relative to the institution of this action, and procedure therein, or relative to the defender's coming to Scotland, and continuing here till he received his citation. Having also attended particularly to the instruction contained in the first part of said remit, which, although the defender had been personally cited, directs the Commissaries "to allow the pursuer to prove that the defender was domiciled, and resident in Scotland at the date of the action;" and considering that the personal citation of a foreigner within this territory, is attended with the very same effect as an execution left at the dwelling-place, where he had remained forty days, which law regards as his presumptive domicile, the Commissaries apprehend that the Superior Court requires evidence, not of this presumptive domicile, the necessity of inquiring into which appears to the Commissaries to be superseded by the personal citation against the defender in process, but that the defender had established a real domicile in Scotland, at the date of the action: Find, upon full consideration of the proof led by the pursuer, and of her pleadings on record, that both parties in this case are confessedly natives of England, and that the real domicile of both, when married at London in the year 1802, and also during their whole cohabitation as husband and wife, has always continued to be in England, or in other places subject to the English law: Find, that the defender, in particular, continued to reside in his English domicile, until he came to Scotland in February 1813, after having previously deserted the pursuer in England: Find, that he afterwards did remain in Scotland till this action was raised in October 1814, but merely as a lodger, from week to week, at inns and lodging-houses in various places, without any change of his real domicile in England, and without any fixed residence here. In respect that such mere presence of a foreigner in this country, as may suf-

(a) See following Report.

fice to found jurisdiction, however long continued, does not necessarily and always infer that the law of Scotland must apply its municipal rules upon questions where he is a defender, in preference to those of his own country, and that our law, on the contrary, as in the case of intestate personal succession, allows inquiry to be made as to this real domicil, and upon principles of international law, adopts the foreign rule of that domicil, when this course may seem just and expedient; and in respect also, that a change of the real domicil made *bona fide et animo remanendi* at the date of the action, seems, in a peculiar degree, requisite to authorize the adoption of our municipal rule, in preference to that of the English law, upon a question by which this English defender's *status* of husband, arising from an English contract, is affected: Find, that the pursuer has not established by evidence, that the defender held that real domicil at the date of this action, which was requisite to be proved. *Separatim*, find the allegation that Scotland is the *locus delicti* or *rei gestæ*, in respect the defender committed adultery here, of no importance or relevancy to the present action, because, in consistorial processes of divorce, acts of adultery are founded upon merely *ad civilem effectum*, and for redress to the private parties injured, and decrees have accordingly been hitherto pronounced in these by this Court, without distinction, whether the crime had been committed in Scotland, or in any other country of the world; (a) although, in criminal causes before the competent tribunal, when the crime of adultery is prosecuted *ad vindictum publicam*, the *locus delicti* is an essential circumstance: Therefore, assoilzie the defender from the conclusions of the present action, as laid for divorce *a vinculo matrimonii*; but in respect there is no rule of the law of Scotland, which prohibits the Commissaries from granting a decree of separation *a mensa et thoro*, and for separate aliment to this pursuer, on the grounds alleged in her libel; while a decree, so qualified, would correspond with the principles of international law; appoint the pursuer to state whether she will restrict her conclusions to this inferior remedy."

In explanation of the grounds of this decision, the officiating Judge (b) observed, that the first duty of the Radical Court, under the remit from the Tribunal of Review, was to give obedience, in full conformity to the spirit, as well as to the letter, of the instructions contained in the interlocutors transmitted upon the bill of advocacy.

With respect to the point of collusion, this duty had been performed without any difficulty. No circumstances had appeared in the cause which gave the slightest indication that the pursuer had any concert or understanding with the defender, directly or indirectly, relative to his placing himself under this jurisdiction, or as to the action she had raised. Her oath, consequently, was the only mean of inquiry upon this head to which recourse could be had, and her deposition was sufficiently explicit, consistent, and satisfactory, to remove all ground for suspecting any collusion on her part. The judgment of the Court must, therefore, in the first place clear the suit in the most unqualified manner of that objection.

The other object to which the investigation of the Primary Court had been directed, was to ascertain from the proof which the pursuer might

(a) Appendix, Note (D.)

(b) Appendix, Note (E.)

lead, whether the defender was domiciled and resident in Scotland when the action was raised?

No difficulty had occurred as to the questions to be put to the witnesses, or as to the import of the answers which they gave. In terms of the remit, the pursuer had been left to take her own course in this proof. She cited such witnesses as she thought proper. Every question suggested was put to them, and their whole answers were fully entered upon the record.

Thus far the duty of obedience was plain in its nature. Neither was there any difficulty in estimating the amount of the proof with respect to the true quality of the defender's domicil and residence in Scotland previous to and at the date of this action. The pursuer had indeed established, by her evidence, with the utmost precision, that her husband, the defender had travelled from England to this country in Spring 1813, and had remained here as a stranger, from week to week, at inns and in furnished lodgings, until he received the citation on the 6th of October 1814. But there had been no attempt made by her to show, that he had any home, establishment, or concerns of business in this country. All the explanation given of his conduct or of his motives for coming and remaining here, was the pursuer's statement in her condescendence, that he had previously deserted her society in England, after he had been sued there for restitution of conjugal rights, and that, before he came here, he had formed an adulterous connection with Elizabeth Osborne, which continued to subsist in this country. Unless it were to be supposed that he wished to give the pursuer an opportunity of dissolving their marriage by this action, no farther indication of his reasons for coming to Scotland, and continuing here, could be any where found in the record of this cause. Consequently, it was clear, that the defender had acquired no real domicil in Scotland; and that he was, at the date of the action, in every sense, according to the construction of law, as exclusively a citizen of England as he had been when he first crossed the Tweed.

In these circumstances, the question for decision now came to be, Whether the conjugal relation between the parties and the defender's *status* of husband should be considered according to the municipal law of England, which was his own country, or according to the municipal law of Scotland? No direction had been given by the remit, except to ascertain what his domicil and residence had been at the date of his citation, and afterwards to proceed according to law. What quality of domicil and residence, then, was requisite to give the preference to the rule of the Scotch law? Was it the presumptive domicil assumed, for the purpose of founding jurisdiction in the case of a stranger, from the fact of his dwelling forty days in this territory, or the real domicil chosen *animo remanendi*, by the rule of which, if he had died intestate on the day he was served with the summons, his personal succession would have been distributed?

The Second Division had not asked the opinion of the other ten Judges of the Superior Court, with respect to the legal consequences of the facts alleged as to the domicil and residence of the defender *at the date of the action*; and the questions and the answers, which appeared upon the record of their proceedings, bore relation only to the domicil *at the date of the marriage*. Both the Judges of the Second Division, when they resolved, by their interlocutor of the 9th March 1816, "to

allow further inquiry as to the domicile," were equally divided in opinion, "whether this inquiry should be limited to the domicile of the defender, or extended to that of both parties?" Evidently, therefore, the *real* domicile alone was then the subject of consideration; for one kind of domicile only is specified in this interlocutor. As to the pursuer, Mrs. Levett, *that* could not possibly be the *presumptive* domicile assumed *fictione juris*, to afford opportunity for citation, because she was the party at whose instance the citation was given; and for the purpose of founding jurisdiction and maintaining the action, it was not necessary that she should ever set her foot in Scotland, provided that she gave a mandate to some person here qualified to act for her. (a) As to the defender again, it must be matter of necessary inference, that domicile, taken in the same sense, was the subject of consideration; for the very same phrase was used in relation to both parties. Besides, the execution returned upon the summons proved that he had been personally cited to the action at Edinburgh. A *presumptive* domicile, therefore, which might admit of citation in absence at the dwelling-place of the defender, could as little be requisite to be proved with regard to him, as with regard to the pursuer, and, consequently, could not be supposed to have been in the view of the Superior Court when their interlocutors were pronounced.

The defender, indeed, had "*residence*" here, for it was proved that he continued in Scotland from some time in February or March 1813, till he got his citation upon the 6th of October in the following year. But it was also proved, that he did so remain without a house of his own, or establishment, or real property, or business, or permanent object of any kind in this country. Now, a stranger dwelling at inns and furnished lodgings, where he hires his accommodation for the week, does not, in the eye of the law, thereby become even an inhabitant of this country, or cease to be one of the land in which he has his proper and permanent abode; (b) more especially when this last has been the place of his nativity. His description here continues to be that of a stranger merely, until he acquires a permanent home and establishment. (c) Nor will he even then become a citizen, unless there are facts inferring that he has transferred *his real domicile* from his native country to Scotland. By the Roman law, ten years residence of a foreigner as a student at an university was requisite to constitute such a domicile. Assuredly, then, in no legal view can the defender, Mr. Levett, be regarded as having any domicile in Scotland, or any residence here, otherwise than transiently, and as an English stranger.

It must be remarked, too, that while under the interlocutor of remit, considered in connection with the previous interlocutors of the Court of Review, no inquiry as to the pursuer, Mrs. Levett's, domicile has been competent; the real domicile of her husband, the defender, appeared, from her own proof, to have been in England at the date of the action, and *that*, by inference of law, consequently is her domicile also. The place or *situs* of the conjugal relation between them, by the law of which

(a) Even the pursuer's oath of calumny might be taken by commission in England upon cause shown, of which there are many instances on record.

(b) Voet, ad Pand. lib. 50. tit. 1. § 1, 2, 3.

(c) Lib. 10. Codicis, tit. 39. leg. 2, 3, 4. *Ibid.* lib. 1. tit. 16. Reg. 239. § 1, 2.

all their reciprocal duties as spouses fell to be regulated, was, therefore, unquestionably in England at the date of this action.

The only other ingredient of the case in point of fact, either alleged or proved, is the commission of the crime of adultery by the defender within this territory. But, from the date of the institution of the Consistorial Court in this kingdom to the present day, it has never been held necessary, or of importance to an action of divorce for adultery maintained here, that the *locus delicti* should be in Scotland. On the contrary, in many cases on record, the crime was committed beyond the limits of Scotland, sometimes altogether in another quarter of the globe. (a) In a very great number of cases, the decree absolving marriage has proceeded on proof of adultery abroad as well as in Scotland, without any distinction; and in no instance was it ever sustained as an objection, that the proof offered was of a crime not committed within this territory. The principles, too, on which this uniform practice has been founded, seem evident and unquestionable. Divorce is the remedy of the party injured, for the private wrong, which that party may overlook or pardon at pleasure, and even at all stages of the judicial procedure after the action has commenced, until a final decree dissolving the relation with the guilty has actually gone forth. The injury consists in the breach of the vow of fidelity. It is neither aggravated nor lessened by the circumstance, that the crime has been committed within the territory of the domicil, or beyond the limits of that territory. Hence the *locus delicti* can furnish no plea either in support of the civil action, or in defence against that action.

A confusion has no doubt sometimes arisen even in the style of judgments and judicial proceedings, from the circumstance that this civil action is founded upon a criminal fact. But the instances are innumerable in the law of Scotland of actions purely civil which arise from delinquency, and are nevertheless maintained for civil reparation only to the private party.

Supposing these views of the facts and of the state of the question to be correct, the argument in favour of the law of the domicil rested on the following grounds:

The essential qualities of marriage, as unalterably fixed by divine institution, are the same throughout all Christendom, and it is in this sense that marriage is a contract *juris gentium*. Consent of the parties, seriously and deliberately given, is, indeed, the basis of this contract, as it is of every lawful and voluntary agreement. But the relation constituted by marriage, and which is the subject of the consent between the husband and wife, distinguishes it from all other civil contracts, as, according to the definition of Justinian, “*viri et mulieris conjunctionem individuum vitæ consuetudinem continentem*,” (b) or “*conjunctionem maris et fœminæ consortium omnis vitæ divini et humani juris communicationem*,” in the words of Modestinus. And as to its origin and peculiar attributes, Lord Stair has strikingly observed, “That marriage itself, and the obligations thence arising, are *jure divino and natural*, appears thus; 1st. Obligations arising from voluntarily engagement take their rule and substance from the will of man, and may be framed and

(a) See Appendix, Note F.

(b) § 1 Inst. de Pat. Pot. Voet, ad Pand. lib. xxiii. tit. 20. § 1. Stair's Inst. b. i. tit. iv. § 2.

composed at his pleasure. But so cannot marriage, wherein it is not in the power of parties, though of common consent, to alter any substantial, as to make marriage for a time, or take the power over the wife from the husband, and place it in her or any other, or the right of protection and provision of the wife from her husband, and so of all the rest. Which evidently demonstrateth, that it is not a human but a divine contract." Hence, in the general view of the subject, and considering it as a contract *juris gentium*, it is evident, that no stipulation can be made a part or a condition of a Christian marriage, which is not implied in the nature of the contract itself as immutably fixed. Neither is there any difference as to principle in the several definitions that have been given. These only vary as to the mode of expression, and as to the degree of illustration which they afford.

Mutual fidelity and affection are among the reciprocal engagements of the parties, either expressed or necessarily implied, and these they must be held to pledge to each other, without any limitation. But no provision can be made for them in contracting marriage, as to the kind or measure of legal redress which shall be competent, if their engagements shall not be performed, or shall be violated on either side. For no equivalent or compensation can be stipulated as a substitute for performance of the essential conditions of marriage, and these admit of no qualification. In the event of failure, it is, therefore, necessarily left to the municipal law of each territory, to prescribe the nature of the reparation which the injured party may obtain, with reference to the original standard to which all Christendom appeals. The legislative power, too, by which the means of obtaining redress must be applied, is altogether independent of the will or control of the private parties, and any stipulation entered into by them, contradictory to the law, which it imposes and alters at pleasure, would be nugatory if attempted. No additional agreement, then, of parties, either to provide or to exclude a particular remedy in case of adultery, can possibly enter into the essential conditions of a marriage, or can be confounded with them. It is equally impossible to control or influence the public law of any territory as to divorce by private paction.

To ascertain whether the municipal rules provided in each state for enforcing performance of conjugal duties, or affording redress in case of their violation, become *ipso jure* essential conditions of all marriages celebrated within its territory, seems to be the next step of the inquiry.

By the law of Scotland, dissolution of a lawful marriage(*a*) is permitted only upon the ground of adultery, as expressly recognized in Scripture, or upon the ground of wilful and continued desertion, as conceived to be there permitted. Consequently, no rule of foreign law which authorizes divorce *a vinculo* for any cause not consistent with the essential conditions of the contract and with the Divine Law, by the interpretation of that authority to which we owe obedience, such as incompatibility of temper, involuntary and temporary absence, or the supervenience of mental or corporeal disease; and no decree of a foreign judicature proceeding on such a rule can affect the conjugal rights of a subject of Scotland in this *forum*.

The same principles apply to foreign rules of law and judicial decrees

(*a*) When the marriage has been unlawfully contracted, it is set aside in Scotland by an action termed Declarator of Nullity.

which regard the constitution of marriage. These also receive effect here only in so far as not inconsistent with the nature and institution of this peculiar contract. Thus a marriage contracted by a party beneath the lawful age, or within the forbidden degrees of propinquity, or a second marriage, while the first stood undissolved by death or divorce *a vinculo matrimonii*, could not be sustained here as the ground of any action for conjugal rights, however it might be supported by any foreign rule or decree.

All municipal regulations, whether relative to the constitution of marriage, or to divorce, which have been established by local statute or usage, and which the legislative power in each independent nation may impose or alter, are, likewise, even when not at variance with the nature of the contract or with holy writ, of a character and description entirely different from its inherent and essential qualities.

Therefore, while every legislature has the power of prescribing rules for its own subjects within its own territory, and while international law generally supports the decisions of the local judicature, pronounced according to the law of the place, in all other countries where the *jus gentium* is acknowledged, there is a necessary limitation of this doctrine, and foreign rules of law cannot be respected here when these are opposite to the fundamental principles of morality, justice, or religion, which govern in our municipal system. Hence, as to questions of marriage and divorce, in particular, no inference or argument can be legitimately drawn from rules or decisions in other countries which rest upon opposite foundations, and where the principles are entirely different, all analogy fails. A right of polygamy, or of despotic power in the husband to inflict personal punishment upon his wife, for example, could not be enforced by a foreign party in this judicature, upon whatever authority it might be maintained in their native land.

But, in the two sister kingdoms of this island, it cannot be denied that the laws of both, as to divorce, although different, appeal to the same standard, and are consistent with the essential conditions of a Christian marriage. By the divine precept it is not imperative to grant divorce *a vinculo* for adultery, but merely permissive. Therefore, the legislative power was equally at liberty to authorize that remedy to be given in Scotland, and to refuse it in England. The proper subjects of the realm, in each country, owe obedience to their own law only. But when the parties, as in the present case, are proved, by their real domicil, to be permanent subjects of the neighbouring kingdom, and not of Scotland, do not the principles of international law require that we should respect the English restriction of the right of divorce, in the due administration of justice, between these strangers?—And is it not enough for the solution of this point, that the true quality of the defender, Mr. Levett's, domicil at the date of the action, is ascertained to be English?

According to the remit of the Superior Court, there can be no question, that if his *real domicil* had appeared from the proof to have been in Scotland at the date of this action, it was the opinion of the Judges, who there decided this point, that the conclusion to dissolve the defender's marriage should be sustained. For, although the law of the contract had been adopted, in the present case, by the interlocutor of the Primary Judicature, a special instruction has been given to recal that interlocutor. In another case, likewise, of Edmondstone against Lock-

hart,(a) where the parties had been married in England, but were, in every view, exclusively citizens and subjects of Scotland, two of the four Judges in the Primary Tribunal were of opinion, that divorce *a vinculo matrimonii* could not be granted; and a special interlocutor to this effect having been [December 9, 1814] accordingly pronounced, upon an application for review, the Superior Court remitted, [March 6, 1816] with instructions, to alter the interlocutor complained of, and to sustain the action.

It could, indeed, be of no importance, that Mr Levett's original domicil was English, if the evidence had established, that he had really changed his domicil, and, by permanent settlement in this country, had become exclusively in this sense a citizen of Scotland at the date of the action. For such total change of domicil is lawful, and does actually take place permanently, and *animo remanendi*, in many cases, between these countries every day. The citizen of England, who thus becomes a Scotsman, by fixing his residence and the seat of his family and fortunes exclusively, and for life, in this country, forms thereafter his peculiar connection as a subject with the law of Scotland, and ceases to have any connection with the municipal law of England, which is foreign, and of no obligation as to our citizens here. Suits in this *forum*, especially relative to the personal condition of a citizen who has his real domicil within this territory, can only be tried under the law of Scotland, and according to its rules. This proposition is self-evident, and applies, without exception, to all judicatures, whether primary or of the last resort, and wherever Courts may sit to try causes which are purely of the Scottish law.

Even the circumstance that the contract has been entered into at a foreign place, is of no importance with respect to marriage. For it implies no intention of the parties to exclude the law of their future domicil, which must prevail independently of their will, if they shall afterwards change their country, and settle permanently in another territory. For example, two Protestants of France, who had been married there before the edict of Nantz was revoked, could not, by the rule of the municipal law in that country, be divorced *a vinculo* upon the suit of the one for adultery of the other. But they might afterwards, during their cohabitation, emigrate to Scotland, and settle here as naturalized citizens, under the act of the 7th of Queen Anne, Cap. 5. After all connection with the French law had been thus dissolved, and after their allegiance and obedience had thus been completely transferred to the law of Scotland, could the husband's action for divorce *a vinculo*, according to the law of Scotland, for adultery of his wife, have been barred in this tribunal by the municipal rule of France? Even in that country, the submission of parties of this description to that rule must have been contrary to their religious principles, and matter of pure necessity. Here they owed no obedience to the French law, and that law had no connection with them, or with their domestic condition, when actually citizens and subjects of Scotland.

No deduction could be necessary to prove, that, according to the principles of international law, a person who was originally an English citi-

(a) See the following Report. See also Report of the decision of the Superior Court in the three cases of Edmondstone; Levett, and Forbes, by the collector for the Faculty of Advocates. Appendix note (G).

zen, might, in the same manner, by emigration from that kingdom, and permanent settlement in Scotland, become exclusively, as to all points of municipal distinction, a citizen of this country. Before the union of the Crowns of England and Scotland, at the death of Queen Elizabeth, England was as much a foreign state as France. By the incorporating union of the nations, no alteration was made in their respective laws which could affect such a point.

Great difficulties have, indeed, been conceived, in ordinary cases, to stand in the way of ascertaining the fact, whether parties, by origin English, have abandoned their native domicil, and really settled in Scotland. These difficulties had likewise been supposed to lead to much uncertainty, with regard to the state of the conjugal relation between the spouses, and, consequently, with regard to the rights of their offspring as to legitimacy and succession, if the law of the real domicil shall be preferred to that which prevails at the place of the contract. But any argument which might be reared upon these grounds, had already been rejected by the decision of the Superior Tribunal, in the case of Edmonstone,<sup>(a)</sup> which was binding and conclusive here. *2dly*. If the point were open, the danger was imaginary. In the legal sense, according to every definition, a permanent settlement was essential to the establishment of a new domicil. A clear proof of change, too, was always requisite to warrant an inference, that the native domicil has been abandoned, and a new one constituted *animo remanendi*. Thus, the most judicious and accurate of the commentators on the civil law had observed:<sup>(b)</sup> “Quoties autem non certo constat, ubi quis domicilium constitutum habeat; et an animus sit inde non discedendi; ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, etsi non omnes æque firmæ, aut singulæ solæ consideratæ non æque urgentes sint. Sic enim in dubio, *in loco originis et domicilio paterno* quemque præsumi continuasse domicilium jam ante dictum.” In the *3d* place, That danger to the good order of society, which really must arise from any uncertainty as to matters of such infinite and general importance, was to be apprehended, not from adopting the clear and universal principle of domicil, but from confounding municipal regulations as to divorce with the essential qualities of marriage.

To prosecute this part of the inquiry farther was, however, unnecessary for the decision of the present case. Because, the proof taken by the pursuer left no room to doubt, that her husband had not established a real domicil in Scotland, so as to become, in construction of law, a citizen and subject of this country rather than of England. His residence here could merely have furnished opportunity to cite him in absence at his dwelling-place, if he had not been personally found. To constitute him a party *in judicio*, that citation was, nevertheless, sufficient. It would have been equally so, if he had arrived in Scotland for the first time in his life, immediately before it was given. Consequently, it was of no importance how long he has been here, if only in the character of a stranger; for the doubt was not with respect to the jurisdiction. No objection, on that head, opposed the suit. The pursuer was also exempted from suspicion of collusive concert, by the terms of her oath, and by the absence of all ground for such a charge against her. Granting, therefore, that the defender might have come to Scot-

(a) See next Report.

(b) Voet, ad Pand. lib. v. tit. 1. § 92, 97.

land, and resided here for the time specified by the witnesses, without any view to this action of divorce, the concession could have no effect upon the question at issue; since, if his intention had been to favour the suit, this circumstance, without the direct or indirect participation of the pursuer, in some arrangement to promote his purpose, could not have affected her action: and if his residence here was not with any such fraudulent intention, it could only weigh in support of the jurisdiction, which was admitted. Still, however, our jurisdiction attached to these English parties and their cause, to no other effect than it would have done, if the defender had got a personal citation within the first hour of his presence in this country. And the point remained entire, whether, when the Scottish judicature holds unexceptionable jurisdiction over English parties, neither of whom had a real domicile here, in an action of divorce for adultery, the rule of the English law, which did not permit dissolution of their marriage by judicial sentence, or the rule of the law of Scotland, which did, should, in this situation, be preferred.

Upon this point no decision in any contested case had been found of prior date to the action of Elizabeth Utterton against Frederick Tewsh, instituted in May 1811, which could be regarded as a precedent. And since that time, the remit from the House of Lords in the case of Lindsay against Tovey, and the subsequent judicial discussions in other causes, had kept the question open. In those of Brunsdon against Wallace, 9th February 1789, Dic. Dec. and Morcombe against Macclelland, 27th June 1801, Fac. Col. the jurisdiction was not sustained, because the defenders had no domicile whatever in this country at the dates of the actions, and had been cited edictally, upon no other ground, except that they were alleged to be amenable *ratione originis*, which was found insufficient. The institutional writers of the law of Scotland likewise have furnished no direct authority.

With respect to ordinary civil actions, it was, however, certain, that the Judge should in general adopt the foreign rule in cases relative to foreign contracts, and between foreign parties. This maxim was only qualified by the exception, that no injury shall thus be done to any important domestic interest of the state, or of its subjects, or municipal law. *Comitas* or courtesy had been assumed as the guiding principle here by jurists, upon the supposition, that such respect to foreign law was to be regarded as a concession. But it was evident, that when a foreign rule was necessary to be applied, in order to obtain the ends of justice, that rule in truth was then adopted for the use of the jurisdiction, and thus became part of the municipal law for that occasion. A debt contracted in the British Indian dominions became exigible here in this manner, with interest *secundum legem loci contractus*, at a rate which it would by statute be usurious and criminal to stipulate in a Scotch agreement, and many other instances were familiar. Of *jurisdiction*, certainly there was no surrender or abatement in choosing that rule, whether municipal or foreign, to guide the decision which the Court found would best promote the ends of justice in the particular case before it; and the sovereignty and independence of the municipal law entirely consisted in the free exercise of jurisdiction. When, without any prejudice to our internal interests, and even with advantage to these, the personal rights and condition or *status* of strangers under their own law, could be considered and preserved in administering justice to them in this *forum*, an extension of the beneficent influence of our jurisdiction only could take

place by availing ourselves of the foreign rule. Situations might even be imagined, in which power to entertain the claim sued must be exclusively derived from a foreign rule. Thus, if our municipal code, as in ruder times, did not still allow any interest at all, *ex lege*, for money due, the action for interest upon a debt contracted in Bengal before a tribunal in Scotland, however clearly just, would rest entirely upon the foreign law of the contract.

It might, upon the other hand, be also sometimes convenient, and not unjust, to decline altogether to exercise jurisdiction between foreign parties and in foreign causes, although there are legal grounds for maintaining in the abstract the competency of the action. For example, if Mr. Levett had never been in Scotland at all, and while he remained at his domicil in England, if the pursuer had arrested some moveable property belonging to him in this country to found jurisdiction, she surely could not have been permitted in this manner to abandon the *forum* of their domicil, and to sue him here for divorce. Accordingly, in the case of Scruton against Gray, December 1, 1772, Dict. Dec. it was decided, that an arrestment *jurisdictionis fundandæ causa* was insufficient to render a declarator of marriage competent against an Irishman not resident in this country at the date of the action, although it was alleged that he had married the pursuer when he was residing in Scotland. But by a well known rule of our municipal law, arrestment of the debtor's moveables founds jurisdiction *ratione rei sitæ* against him, though a foreigner or absent from this kingdom, for recovery of ordinary civil debts, however much the amount of these might exceed the fund arrested. Consequently, the law of Scotland did recognise a distinction, according to which arrestment of a stranger's effects was sufficient to enable our Courts of justice to give effect to claims against him arising from ordinary obligations, while it was not sufficient in cases where his *status* of marriage in his own country was at stake. The reason, undoubtedly, was, that the *status* of the citizens in their own country was the most important concern of every municipal system, not even excepting rights of immoveable property. At the same time, a stranger's *status* in his own country never could be a matter of any concern to the law of another kingdom which he merely happened to visit.

With regard to suits of all descriptions, *actor sequitur forum rei* was the general rule, and great injustice might often arise from constituting a *forum* against a stranger upon slight grounds; because, in general, it was only in his ordinary and proper *forum* that he could meet the claim made against him with due preparation, and upon fair terms. When both parties were foreign and the rights to be affected by the decision were likewise foreign, the local judicature, by declining to exercise jurisdiction, might avoid the difficulty and burden of trying questions with which its own municipal system had no concern, and with the laws of which it is unacquainted. The necessity of submitting to this hardship, and of renouncing the privilege of declinature, only occurred, as in the present case, when the defender, although a stranger, does not return home, and while here could not be convened in the *forum* of his real domicil. Still, however, it was but *ex debito justitiæ* that the duty must then be undertaken, and while it was to be performed without prejudice to the internal system and interests of this kingdom. Regard in so far as these were not affected, was certainly due to the law of the country of which the parties were truly subjects, and care should

be taken not unnecessarily to violate the rules and arrangements of that law.

It must be evident, that the claims to mutual forbearance and respect, which the *jus gentium* supports between independent nations, were infinitely strengthened and augmented in this case by the peculiar nature of the connection between the kingdoms of Great Britain. It was equally evident, that there was no subject upon which it was so essential that these claims should receive due attention, as the municipal laws of marriage and divorce; for while the three nations of England, Scotland, and Ireland, politically formed one people, their several municipal rules were so discordant, as to afford great temptation to married parties of the other countries to seek the dissolution of their conjugal relation in Scotland, and thus to defraud the law of England. We had likewise seen in the case of Lolly, that a divorce *a vinculo* of an English marriage would not protect an English party from the pains of bigamy for marrying again in England. But a second marriage of such a party in Scotland was valid by the law of this country. Hence the most distressing collision must frequently arise, and endless contests of the most painful and injurious description were to be apprehended upon the rights of legitimacy and succession among the descendants of such parties, if the law of the real domicil should be disregarded.

All these evils to the subjects of the Scotch as well as of the English law, whose interests it was impossible to separate, might, however, certainly be avoided, by distinguishing between the right of jurisdiction and the rule of judgment; and as to the former point, by holding it sufficient that the defender should be regularly convened *in judicio*, whether by citation given to him personally, or left at his presumptive domicil; but as to the latter point, adopting the law of the real domicil. Thus, in the case of Scotch parties, if the wife were to obtain a decree of divorce against her husband *a vinculo matrimonii* in Prussia, (a) or any other country he happened to visit as a stranger, for incompatibility of temper, or because he had been imprisoned upon a criminal sentence, or had entered into an ignominious employment, or become an object of her rooted dislike, this would not prevent his suing with success here for restitution of his conjugal rights when he returned home. Such a foreign decree would be invalid here, because it would be held inconsistent with the essential conditions of marriage, and with our interpretation of the Divine Law. Suppose, again, that the foreign decree of divorce were to be given against a Scotch husband (b) during temporary absence from home, for any shorter period than that fixed by the municipal law of Scotland, as inferring desertion, it seemed equally clear that such a sentence could not be respected by this judicature, because he has not changed his real domicil, and had remained permanently subject to the law of Scotland, which, consequently, ought not to have been violated. Upon the same principles, the present action of Mrs. Levett must either be dismissed, or sustained only to the effect of giving such redress as was consistent with the law of England, where the parties have their real domicil.

Questions, by which personal *status* was affected, had no doubt been supposed to form an exception to the doctrine of international law, upon

(a) Prussian Code, Articles 703, 704, 707, 718. See Appendix, Note (N.)

(b) Prussian Code, Articles 690, 693.

which the claim of respect to foreign rules is founded, and the maxim, "Major hic alibi *mutato domicilio* incipiat fieri minor,"(a) had been cited to prove that the municipal code was exclusively to be consulted in the disposal of such cases. But even the very terms of this quotation showed that domicil is the *criterion*, and assumed a previous change of domicil to be requisite for the application of the municipal law of the place, to the point at what age an emigrant from another country becomes *sui juris*. Nor could there be any doubt that the law of the real domicil must ultimately govern as to all permanent qualities of personal condition; since it was to that law that the party must be permanently subject. The greatest jealousy of foreign control or interference was likewise perfectly justifiable, and even unavoidable, in every municipal system, so far as regards the personal condition of all who are truly citizens of the country; on account of the peculiar importance of those interests which are involved.

On the other hand, if the alternative of dismissing the action *simpli-citer* were to be chosen, redress in this, and in many similar cases, would be altogether excluded for the greatest injuries, and married persons of the other kingdoms of this empire, in particular, who violated their conjugal engagements, would be invited to spend their lives in Scotland in licensed profligacy, and here to set at defiance the rights of their injured partners. The prejudice which would thus arise to the interests of morality and good order, both here and in the sister kingdoms, was great and evident. While our law afforded more ample redress for conjugal wrongs than that of our neighbours, we could not, however, be reduced to this necessity. It remained, then, to consider in what manner, and upon what principles of jurisprudence or authority, the other alternative of giving the remedy of separation *a mensa et thoro*, with separate aliment, might be adopted in the present and similar cases of English parties.

Before the Reformation in Scotland, divorce *a vinculo* appeared to have been competent for adultery. There was also evidence, that separation *a mensa et thoro*, with separate aliment, had been commonly awarded for that offence by the consistorial judicature(b) of the Catholic church in this country. In the commission, statutes, and instructions relative to the establishment and jurisdiction of this Court after the Reformation, no precise rule could be found. In one instance upon record, an action of divorce for adultery, containing no conclusion, that the pursuer, a lady of the Catholic persuasion, should be free to enter into another marriage during the life of the defender, as if he had been naturally dead, was sustained in the year 1705,(c) notwithstanding a serious opposition, upon the ground, that a decree so qualified was contrary to the principles of our modern law and of the Protestant religion. But in common practice, since the original appointment of the Commissaries anno 1563, divorce *a vinculo matrimonii* had, with this exception, been constantly concluded for in the present form, on the ground of adultery, and separation *a mensa et thoro*, upon the ground of maltreatment, which endangered the safety of the injured party, or rendered

(a) Hertius, p. 173.

(b) Appendix, Note (H.)

(c) Mrs. Barbara Wauchope against Sir George Seaton of Garleton. See Appendix, Note (I).

the performance of the conjugal duties impossible. Although the more complete remedy of dissolving the marriage had thus in practice been hitherto preferred by parties who were pursuers, yet adultery might in truth often become the most grievous kind of maltreatment. For example, the husband, by adulterous connections in his house, might render it impossible for his wife to submit to the pollution and disgrace of living with him. At the same time, she might resolve to prefer the interest of her children to her own freedom, and not to set him at liberty to marry his paramour. There was surely no rule of law or justice which, in that situation, could prevent her from suing for separate aliment, although she would not claim the right of divorce *a vinculo*, nor had any principle been discovered which prohibited this Court from granting a decree for separation *a mensa et thoro*, if concluded for to protect her morals and person from contamination.

But supposing that the course of practice might absolutely exclude this redress for adultery as to Scotch parties, still separation *a mensa et thoro*, with separate aliment, was a species of reparation for conjugal wrongs, acknowledged and received in our municipal system, and no other redress could be given in the case of English or Irish parties, without producing very serious dangers both to ourselves and to our neighbours. With respect to form, and perhaps also in some of its consequences, the judicial separation *a mensa et thoro* of the English law was different. But in principle, and in its general nature, it appeared to correspond with this remedy in the law of Scotland. By neither was the marriage dissolved; nor in either did the wife, if pursuer, obtain her patrimonial rights, as in the case of dissolution, but only a suitable provision for her support, appointed at the discretion of the Court.(a) The "alimony" of the English law seemed to be precisely upon the same footing with our aliment, and there appeared to be no essential difference in the other articles which this kind of redress comprehends. Since the Scottish Consistorial judicature had power to give the greater remedy of divorce *a vinculo* for adultery, when *that* was excluded from no fault of the party injured, and merely because the defender happened to be an English subject, it must have power to give the lesser remedy. At the same time, in all actions respecting foreign contract and between foreign parties, our own forms are retained; although we give effect to the rule adopted from another system of law, in so far as compatible therewith. Neither was there any call to depart from them on the present occasion. For, in spirit and effect, the English remedy might be given to English parties in this *forum*, according to the Scottish form, and mode of judicial procedure, and justice might thus be done between the parties, without prejudice to either municipal system. Since this pursuer had not hitherto claimed the remedy of her own law, the Court, by its interlocutor, however, could only inform her, that her action might still be entertained, if she chose to restrict her conclusion to that extent.

The pursuer lodged a minute,(b) by which she declined to restrict her conclusion, and "the Commissaries (9th August 1816), having considered this minute, and resumed consideration of the whole process, in respect the pursuer declines to restrict the conclusions of her libel to a decree of separation *a mensa et thoro*, and for separate aliment; there-

(a) Burn's Ecclesiastical Law, 6th edition, anno 1797, Vol. II. p. 502, 503.

(b) Appendix, Note (K.)

fore, upon the grounds assigned in the interlocutor of the 19th of July last, assoilzied the defender from the whole conclusions of the libel, and decerned."

Application was made for the review of the Superior Tribunal, by bill of advocacy, which was presented, not to the Second Division of the Court of Session, which had given the special remit upon the former bill, but to the First Division of that Court, to be considered there *ex parte*; and Lord Cringletie issued an order upon the bill, in these terms (16th November 1816): "The Lord Ordinary, having advised this bill, with the process before the Commissaries, to which no answers have been given in, although ordered, In respect that the interlocutor of the Commissaries has been pronounced, in consequence of a remit from Lord Reston, Ordinary, after advising with the Second Division of the Court, informed by the opinions of the whole Court, and that the Court ought to have an opportunity of judging, whether the interlocutor of the Commissaries be or be not in conformity to the true spirit and object of the remit; appoints the bill to be printed and boxed, that the Lord Ordinary may report the same to the First Division of the Court."

But upon his Lordship's report, the Judges of the First Division were unanimously of opinion, that the cause had been improperly brought by the pursuer before them, and it was accordingly remitted to the Second Division of the Court.

A judgment, remitting the cause to the Commissaries, was afterwards pronounced in these terms (21st December 1816): "The Lord Ordinary, having again considered the bill and former procedure, with the proof and oath of calumny, and advised with the Lords of the Second Division, remits to the Commissaries, with instructions to alter their interlocutor, and to proceed in the divorce, according to the rules of law."(*a*)

Although the Primary Court had pronounced a special interlocutor upon all the points of the case, yet, as it was thus directed to alter the whole of that interlocutor, without any reservation, the Commissaries, in obedience to the remit of the Lord Ordinary, altered, *in toto*, their former interlocutor. They afterwards allowed a proof of the defender's guilt, in common form, and proceeded in the action of divorce, as directed by the Superior Court, in the same manner as if it had been maintained between parties who were citizens of Scotland.

(*a*) Appendix, Note (L.)

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THOMAS STIRLING EDMONSTONE, Esq., v. MRS. ANNA-BELLA LOCKHART, *alias* EDMONSTONE.(*a*)—p. 168.

BOTH parties, in this case, were of Scotch families, and born and educated in Scotland. The pursuer entered into the army, and was some time on foreign service, but afterwards retired, and settled in his native country. Having, at a subsequent period of his life, obtained a company in the Scotch militia regiment of his own county of Lanark, he was

(*a*) This case was extrajudicially settled by compromise between the parties, after a proof had been allowed by the Court.

stationed with that corps in England, and was there married in 1805, according to the English ritual, to the defender, who was sister of the commanding officer, and resided at the time in his family. In contemplation of that marriage, the pursuer's resignation had been previously proposed to the colonel of the regiment, and had been accepted. An antenuptial contract had also been executed in the Scotch form, relative to the patrimonial concerns of the parties, and for eight years they cohabited together as husband and wife in Scotland, on a farm granted in lease to the pursuer by the defender's brother. But the pursuer accused her of having there entered into an adulterous connection with one of his servants. Against his action of divorce she pleaded in defence, that her marriage having been celebrated under the English law, was indissoluble by judicial sentence. This case was seriously contested, and, at the close of the discussion, when the Court came to decide, two of the Judges in the Primary Tribunal were of opinion, that the conclusions and allegations of the pursuer ought to be sustained as relevant, for the following reasons.

The admissions of the defender, and evidence in process, established that the only domicile of both parties was in Scotland at the date of the action;—indeed, that, during their whole lives, both had been citizens and subjects of this country. If the law of the defender's real domicile should govern the decision in such cases, no doubt, therefore, could exist, that the usual conclusion of our action for divorce *a vinculo matrimonii* must here be sustained. This was held to be the universal rule. At the same time, all the circumstances relative to the particular contract of these parties, except the place of its date, and all the general considerations of justice and expediency, on which the principles of international law were founded, likewise led to this result.

In the outset, it was impossible to overlook the singular nature and importance of the consequences which the question involved.

Certainly, the marriage of these parties had been entered into with the intention on both sides that they should cohabit and reside permanently in their native land. If the law of the domicile must yield to that of the place of the contract in this instance, it must then likewise give way in all other cases which can possibly occur. It would follow, too, that every Scotchman who should marry at any place not within the limits of this kingdom, must return here subject to the conditions of a foreign law, in all that regards his conjugal relation and rights as a husband. With respect to the most important private interests, a decision which should adopt this principle must, therefore, often produce very serious consequences to individuals of this community, whose number it was impossible to calculate, and in a degree of which no precise estimate could be formed.

It would be necessary also to consider, in the proper place, to what extent the rights of the whole people of Scotland, as established by public statutes of this kingdom, and of the empire at large, and by the national compact of union, would be affected. For, by the acknowledged principles of international law, no rule of any foreign code could be admitted here, if prejudicial to essential rights and interests of this country, and authorities and views relative to this last point, ought even to have peculiar weight in guiding the judgment of a Court to the exclusive jurisdiction of which, in the first instance, all Scotland is subject, as to this department of the law.

Let the question, however, be first considered merely as one between parties married in England, but who are nevertheless in every view exclusively subjects to the municipal law of Scotland, and as one for the cognizance of which, therefore, judicatures of the Scottish law only could have any jurisdiction. It thus resolved into the point, whether indissolubility by judicial sentence was an essential and indelible condition of all marriages, even when celebrated by strangers at any place under the dominion of the English law, which the parties bound themselves to preserve in their permanent domicil after they should return home, and which the *jus gentium* required the Courts of their own country to abstain from violating?

A decision in the affirmative upon this point, it was evident, would exclude all attention to the domicil of the parties in every sense of that term, either at the date of the marriage or at the date of the action of divorce; for, by license duly obtained, and with consent of parents or guardians when necessary, strangers might be lawfully married in England without acquiring any domicil there. The condition supposed would likewise become part of the contract itself at the time of celebration. But the argument of the defender, Mrs. Edmonstone, could not be maintained to this extent, and it was certain that the mere locality of the transaction was not sufficient *per se* to attach inseparably to marriage the rules of the municipal system of the country in which it had been solemnized. The familiar example of marriages contracted by English parties at Gretna Green, or elsewhere within the territory of Scotland, which, nevertheless, are regarded as English, at least with respect to all consequences that affect the conjugal relation during their subsistence, clearly proved, that, even according to the construction of the English law, the quality of the real domicil outweighs this consideration. Indeed, an opposite doctrine would be manifestly irrational. Since strangers form no connection but during the time they are there with countries they only visit, and by temporary absence in no respect dissolve their exclusive connection with their own country, or weaken their obligations of obedience to its municipal system of law when they shall return home. Besides, as to the present case, while it was indisputable that no private parties could make a valid agreement to annul or qualify the public law of Scotland relative to divorce in this *forum*, it was equally clear that the place of celebration of their marriage in England was much less matter of choice to this pursuer and defender, than Gretna Green in Scotland ever is to English fugitives; and that neither of them could possibly think or intend thus to set aside the rule of their own law as to a most important and general right of redress, should either afterwards commit the crime of adultery.

Parties, indeed, in all civil contracts, looked to the place of performance, and not to the place of date, for the law as to fulfilment or redress upon failure in every point which was not the subject of precise covenant, and in marriage, especially, could only have in view the law of the real domicil in which they meant for life to cohabit. It was, therefore, as illogical to infer that the *lex loci contractus* had been in the contemplation or option of either of the present parties when they married in England, as it would have been to make this assumption, if the regiment they accompanied had formed a part of the regular army, and had then been stationed upon service in Italy, or Spain, or Russia, Denmark, Sweden, or Prussia, or in any other region of the world.

In an abstract view, the defender, notwithstanding all the adverse circumstances of her special case, did contend that indissolubility by judicial sentence truly is an inherent and indefeasible condition of her marriage with the pursuer. But, in the statement of this proposition, it must necessarily be assumed, that their marriage is to be regarded as English in respect of the place of celebration, and not as Scotch, in respect of the permanent and real domicile of the parties even at the date when it was solemnized. It must likewise be assumed, that the municipal law of each country, as to divorce for violation of conjugal engagements, becomes part of the contract itself as to every marriage celebrated within its territory, and remains inseparably attached to that contract during the joint lives of the parties, although they should then be, and even should always have been, and at the date of the action should continue subjects and citizens of another kingdom, where a different rule prevails, and where they have their exclusive and permanent domicile.

The reasons for rejecting the assumption that the defender's marriage was to be regarded as English, had already been given. But a more extensive and deliberate consideration was due to the importance of the argument, that the law of the place of celebration became an inseparable part of the contract between these parties, supposing their marriage, by legal construction, to be truly English.

Certain qualities were essential to marriage by the Divine institution. These consequently were the same in all the states of Christendom, and every where invariably described the contract itself, and the relation of husband and wife, which is the subject of that contract, not as local and municipal institutions, but as universal and *juris gentium*.<sup>(a)</sup> Consent by a single man and woman, capable of contracting, and not within the forbidden degrees of propinquity, to be united for life, was indispensably required as essential to the constitution of the conjugal relation in all countries, where the Christian religion and the law of nations had been acknowledged. Therefore, no engagement of parties to each other, which wanted any of these essential requisites, or which contained any ingredient inconsistent with these, could be considered as a marriage, in conformity to whatever system of religion, government, or law, and in whatever region it might have been framed. And it was equally certain, that every contract, regularly entered into, which had these essential requisites, would be received as a valid marriage in all civilized nations, however widely the rules established in each of them might differ from those of the country where it had been celebrated, with respect to the forms of lawful solemnization, or with respect to patrimonial arrangements and consequences, or with respect to the modes of enforcing performance of the conjugal obligations, or of affording redress to the injured spouse when these should be violated.

A great and very important distinction thus necessarily arose between the essential qualities of marriage, which were derived from no statutes of any human legislature, but from a far higher source, and municipal rules, relative either to the constitution or to the consequences of that peculiar contract. The former were universally and equally respected, according to the religion and jurisprudence of all communities of Christendom. The latter were provided by the legislative power in each state for the regulation only of its own subjects, and as had always been

(a) Stair's Inst. b. i. t. 4. from the beginning to the 8th section.

admitted, were not of imperative obligation beyond the limits of its own territory, or as to the subjects of any other independent state.

Besides, there was not even a stipulation by the parties in the English ritual of marriage, or in any other form of the nuptial ceremony known in Europe upon the subject of divorce. Mutual fidelity was indeed pledged by them in all Christian marriages. But it was left to the legislature and municipal law in England, as well as in Scotland, and in all other countries, to provide and apply the redress in case this vow should be broken. Yet merely because the Consistorial judicatures in the neighbouring kingdom had not been invested, as we were here, with power to dissolve marriage by judicial sentence, for adultery during its subsistence, this state of the law, by a strange fallacy of argument, was held in the one country *to reflect back upon the contract itself* the condition of indissolubility, and, in the other, that of being *sua natura* dissoluble by judicial sentence. Certainly the familiar practice of parliamentary divorce in England, during the two last centuries, together with the nature of the process by which it was obtained, and the state of the law in that kingdom, till near the close of the sixteenth century, if correctly reported by Burn, proved the fact to be the reverse as to both periods. (a) For, in the words of that author, "a divorce for adultery was anciently *a vinculo matrimonii*; and, therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the church of England was, that, after a divorce for adultery, the parties might marry again; but in Foljambe's case aforesaid, H. 44. El. in the Star-Chamber, that opinion was changed; and Archbishop Bancroft, by the advice of divines, held, that adultery was only a cause of divorce *a mensa et thoro*." And he refers to the report of that case by Serjeant Salkeld, and to the larger work of Archdeacon Gibson on the Ecclesiastical Law of England.

An English marriage which suffered dissolution by judicial sentence for adultery before the year 1603, and that English marriage which was last dissolved by act of Parliament, were nevertheless indisputably of the very same quality and condition with all other marriages that have been celebrated under the law of England, and did not differ as to the point now under consideration from Scottish marriages celebrated under the law of Scotland. All, therefore, have common qualities, which are independent of municipal regulation, and not derived from it. Beyond all doubt, it was from these qualities, too, that marriage itself, in the general view, became a contract *juris gentium*, which, without distinction, on account of the country where it was entered into, or peculiar forms and conditions under which it was there solemnized, or of the provisions there established to enforce performance, or give redress for violation of the conjugal engagements, was in all other nations received and respected as if it had been regularly celebrated under their own law.

The fact, whether a valid contract had been made or not, did, no doubt, depend upon the conformity of the transaction to the law of the place where it bore date. Because, as to all forms and conditions, not inconsistent with the nature of the institution of marriage, and with those essential qualities which are *juris gentium*, it was the province of the municipal system to furnish the rule. But when the limitation was observed, that the essential qualities of marriage were not liable to be

(a) Ecclesiastical Law of England by Richard Burn, LL.D.; sixth edition, published anno 1797, p. 503, Vol. II.

affected or varied by municipal rules, the circumstance that these rules governed as to the mode of constitution, with regard to marriage, as with regard to all other civil contracts, could not perplex the question.

It was of consequence also to distinguish carefully between municipal rules as to the constitution of contracts, and those which relate to claims for performance or redress. The former were derived from the local statutes or usages of the place where each contract bore date; the latter, from the same authorities in the place where fulfilment of its obligations was sued. Where these were at variance, international law might, no doubt, require that the peculiar conditions of a foreign contract should be respected; and this demand was here made by the defender as to the English law of divorce. But it was denied that the municipal rule of the English law could be regarded as one of the conditions of her contract, or that this rule became an essential and indelible quality of every marriage celebrated even by strangers within the territories of England. On the contrary, regulations as to divorce, both in respect of their origin and of their nature, were held to form a subject altogether different, and to belong to a class entirely separate and distinct from the essential qualities of marriage.

No contrast, indeed, ever was more striking, than that which subsisted between them. Never was the different impress of divine and human origin more manifest. According to views of expediency and purposes of internal policy, often doubtful and transient, each legislature, following exclusively its own objects, had not only laid down peculiar rules, but had changed these from time to time, as the circumstances of its own subjects happened to alter. Hence, in these municipal rules, there was so little of fixed and essential principle, that a collection of the whole, even upon the single article of divorce, would, at first sight, appear little better than a ludicrous exhibition of human inconsistency and caprice. Nor, even after a stricter examination, would satisfactory reasons always be found in the peculiar situation of each community for its peculiar provisions.

The canons of the Roman Catholic church itself, in which alone uniformity now prevails, afforded the most striking proofs of this proposition; (a) for, till the date of the conclusion adopted on the 11th November 1563 by the celebrated popish Council of Trent, these had been constantly shifting to all points between the opposite extremes upon the subject of divorce. Then, no doubt, the anathema was issued against dissolution of marriage by judicial sentence, which still hangs over the heads of the members of that church. But the reformed religion had been established by law in Scotland more than three years before, (b) and in England under Edward VI. by the proceedings anno 1547. It might be farther observed, that a canon of the Council of Trent, which had then sat seven years and a half, from the date when it first met upon 11th March 1544, for the very purpose of averting or suppressing the Reformation, was surely of no weight in the present discussion. (c)

In the Protestant states of Europe, and under the Greek church, the utmost diversity of rule on this subject continued still to prevail, from

(a) Appendix, Note (M).

(b) Act of the Regent and Estates of Parliament, 24th August 1560, ratified by act 2d, first Parliament James I. 15th December 1567, "anent the abolishing of the p'ope and his usurped authoritie."

(c) See Father Paul's History of the Council of Trent.

the extreme of refusing to give divorce *a vinculo*, even for adultery, in any case, to the opposite extreme of allowing dissolution of marriage for causes which our law accounted perfectly frivolous.(a)

If these observations were well founded; it must then plainly follow, that the municipal laws, with respect to divorce, of particular kingdoms and states, also were things altogether different from the essential conditions of marriage. All other views which could be taken of the subject likewise led to the same conclusion.

The restraints imposed to prevent improper marriages, the solemnities of celebration, and the requisite evidence, by which that fact may be proved, like the rules as to divorce and other provisions to enforce performance of conjugal duties, or to afford redress for conjugal wrongs, were various in different countries, and had, in each state, been appointed and altered by municipal regulations, at the pleasure of the legislative power. Thus, in England, till the statute of the 26th Geo. II. cap. 33. swept away, in the language of Blackstone, the whole subject of clandestine and irregular marriages from the English jurisprudence, this contract, as to the requisites for its constitution, and the proof of celebration, rested upon the same basis on which it still does in Scotland. "Any contract,"(b) says that author, "made *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was, before the late act, deemed a valid marriage to many purposes; and the parties might be compelled, in the Spiritual Courts, to celebrate it *in facie ecclesiæ*."

Still the statutory enactments which required permission to marry, in certain cases, and which regulated the solemnities or the mode of proof, could not be said, in any just sense, to have altered the essential qualities of an English marriage. For, assuredly, if any English parties still survived, who were united before the year 1754, their marriage could not be regarded as a different contract *jure gentium*, from that of parties married under the English law since the date of the act which was then passed. The Dutch law,(c) which, in general, as to this department, corresponded with that of Scotland, also differed from it, in requiring the consent of parents to the marriage of their children, viz. for sons till 25, and for daughters till 20 years of age. But it could not be maintained, that thus an essential difference existed between the quality of a Dutch and of a Scotch marriage. Indeed, it was quite unnecessary to multiply illustrations in support of the proposition, that municipal rules, as to the requisites for permission to marry, and as to the forms, and evidence of the contract, like the laws as to divorce, formed a subject of jurisprudence quite distinct from the essential qualities of marriage.

By this train of reasoning it was not, however, meant to deny, that the laws, as to divorce, which, in the present case, were the particular object of consideration, must be of the highest importance in each municipal system. On the contrary, the argument of the pursuer, that the rule of their own country must be now followed, in administering justice to these parties, rested upon this very ground. But municipal rules, provided by the legislative power in each separate state, regarded only

(a) Appendix, Note (N.)

(b) Blackstone's Comm. b. i. cap. 15. p. 439.

(c) Vianius, in Inst. lib. i. tit. 10.

those persons who are at the time subjects of that state, as having their real domicil then within its territory. The importance of all provisions, relative to marriage and divorce, to every state in regard to its own subjects, was the circumstance which demanded careful observance of this necessary limitation. For here, no concession could be safely made to foreign interests, which might disturb internal arrangements, that affect the whole frame and order of society. If, therefore, it should be found, that in Scotland we must apply our own law of divorce, in questions between our own citizens, it would follow, that, for the very same reasons, when the parties were citizens of England, we ought to consult the English rule on principles of international law. Thus, the adoption of the real domicil, as the *criterion*, was the only method by which justice could be done between parties, with safety to the municipal systems, both of the territory in which the jurisdiction over them was constituted, and of the country from which they came when strangers. When the parties, as in this instance, were indisputably natives, as well as really permanently subjects of Scotland, it was likewise obvious that no collision, in the proper sense, could arise from applying our own rule. Because, by this proceeding, no English, or other interest that was foreign, could be affected, and no tribunal or judge could have competency afterwards to review the sentence, except in the administration exclusively of the Scottish municipal law. Although the supreme judicature of appeal was common to the whole empire, it had, accordingly, always been acknowledged, that the municipal law of each of the respective kingdoms was in that tribunal most sacredly observed.

In this view, the real domicil afforded a principle of decision, which was universal in its application, and against which no good objection occurred. No rule of law, indeed, could be chosen, which the fallibility of human judgment might not sometimes misapply. Here, however, the advantage of all the security against error which could exist, was furnished by a legal presumption, every where admitted, in favour of the *original* domicil, and which could only be removed by conclusive proof of a change. This point was so perfectly settled, that it would be a waste of time to cite authorities upon it. The maxim of law, in the words of Voet, lib. v. § 97, 100, was, “*In loco originis et domicilio paterno quemque presumi continuasse domicilium;*” and, although the original domicil might be abandoned, and a new one constituted, the burden of proving the alteration was laid upon the proper side, and supposing the judicature to perform its duty with accuracy, all risk of confusion and uncertainty must be avoided. A result more satisfactory could not well be imagined, since thus the personal condition of the subjects of each state must be regulated by the municipal law of that state, and never can be disturbed by the interference of foreign rules. While, for example, we should refuse, in this jurisdiction of Scotland, to dissolve marriage in an action of divorce between parties who had their real domicil in England, from respect to the English law, we must, on the very same ground, administer the municipal law of Scotland to these Scottish parties.

Upon the other hand, if the *lex loci contractus* should be preferred to that of the real domicil, the diversity of rule as to divorce which prevailed in the various states of Christendom was so infinite, and the freedom of intercourse and of emigration for temporary and transient residence merely so great, that no municipal system of jurisprudence could, upon this

footing, remain at all consistent or uniform as to the administration of civil justice in the most important of all departments among the permanent and undoubted subjects of the realm. In no other country, too, of the world could consequences more anomalous and revolting follow from this situation than in Scotland. There was no region which our citizens did not visit. All Scotchmen holding any employment in all the other dominions of this empire, whether civil or military, must often place themselves under the law of England, and at the period of life when it is usual to marry. A great proportion, especially of those in the upper ranks, spend their youth abroad for purposes of study, amusement, and private business. If, then, all who marry in any other country must bring home, when they return to Scotland, the laws of divorce from each place of celebration as essential qualities of their conjugal relation, we must, instead of one rule, have all the incongruous regulations of the rest of the world on the subject of divorce established in the municipal law of Scotland, as to individuals or as to classes of our countrymen and fellow-citizens. The inconveniences of so unpleasant a situation must be endured, too, according to this hypothesis, for the sake of foreign systems, with which these very parties have no longer the slightest connection, and which can derive no possible benefit from our preference.

Now, the *jus gentium* has, in every text upon the subject, uniformly rested the claim to *comitas*, on the ground that prejudice must arise to important interests of another country from refusal to observe it. And in the annunciation of the principle upon which respect to a foreign rule is in that situation required, the conditions have always been added, that this shall be conceded only when no injury shall thereby arise to the country or people to which the right of jurisdiction belongs, in whatever regards the independence of their own system of law, or the interests of religion, morality, and good order within the state. In the words of Vattel, p. 62, § 14 and § 16, "a nation owes to herself in the first place, and in preference to all other nations, to do every thing she can to promote her own happiness. When, therefore, she cannot contribute to the welfare of another nation without doing an essential injury to herself, her obligation ceases on that particular occasion, and she is considered as lying under a disability to perform the office in question." The claim that *comitas* shall be observed, must therefore always be qualified by the inherent condition, *quatenus sine prejudicio indulgentium fieri potest*: And the questions, whether the remedy concluded for cannot, in point of fact, be granted without prejudice to our neighbours, or refused without prejudice to ourselves, or, *vice versa*, and how the balance lies, must necessarily become matter of judicial cognizance whenever *comitas* is claimed in a depending cause. When the real domicil of the defender happened to be foreign to the country of the jurisdiction, it was plain that, in this situation, the decision could only affect the foreign law, and respect to its rules, in so far as not inconsistent with the general principles of religion, morality, and justice, established in the country to which the jurisdiction belonged, could not create any prejudice to domestic interests there. When, on the contrary, as in the present case of Mr. and Mrs. Edmondstone, the real domicil of both parties was within the territory of the jurisdiction, no foreign interest was at all involved. Consequently, there was no ground on which *comitas* could in this situation be required, and it would indeed be *comitas comitatis* spontaneously to abandon the rule of our munici-

pal law as an unsought and unlooked for tribute of imaginary respect to that of England, or of any foreign system.

At all events, it was quite clear that the municipal rule of the law of Scotland could not, according to the principles of international law, be sacrificed when essential injury to our own system must plainly follow. Whether, in point of fact, such injury would really take place, if we were to deny the right of divorce *a vinculo* for adultery to all Scotch citizens, who had been married in any country where that remedy could not be given by judicial sentence, must, however, be determined from the value in our municipal system of the rule which it is proposed to surrender, as well as from the number of cases in which the demand for this sacrifice might occur.

Ever since the date of the Reformation in this kingdom, divorce *a vinculo*, by judicial sentence had been a very important part of the Scottish consistorial law. Previous to that date, there was some evidence to show that it had not been unknown in the practice of the consistorial judicatures of the Catholic church in this country, and in the authentic statutes and precedents of our common law, no reference appeared to the existence of an opposite rule in more ancient times. (a) That remedy for adultery, therefore, was regarded by the whole people of Scotland as their undeniable right, and, surely, there could be no just reason for placing Scotchmen, who marry abroad, under any peculiar and partial disadvantage in this *forum*. Certainly, too, the substitution of the inferior redress, by separation *a mensa et thoro*, for the greatest of conjugal injuries, would, according to the national habits of thinking, and to the principles of honour, morality, and religion, which prevail in Scotland, be most unsatisfactory here. In every rank, the injured parties usually conceived it a duty to expel the pollution of adultery from their families and bosoms. It was the universal opinion of the Scottish people, that the innocent party could not, without injustice, be compelled afterwards to submit, under any modification, to the bond of marriage, which, in that situation, could only subsist as an intolerable burden and grievance. Accordingly since this judicature was instituted, in the year 1563, there had not been a single instance found, of a suit for separation *a mensa et thoro*, on account of adultery, or one in which the action did not conclude for dissolution of the marriage. In a single case only, which occurred in the year 1705, the usual conclusion for freedom to marry again appeared to have been omitted, the pursuer in that instance being of the Roman Catholic faith. Parliamentary divorce, from the expence and difficulty of the process, it must be evident was altogether beyond the reach of the great body of this people. Yet the conjugal relation had stood not less, but infinitely more sacred and secure in Scotland since the religion of the kingdom became Protestant, and since separations *a mensa et thoro* for adultery, which were extremely common under the Popish jurisdiction, fell into total disuse. (b) While it had been competent and open to persons so injured, in whatever rank of society, to obtain divorce *a vinculo*, the number of actions, in proportion to that of the population, seemed to have remained nearly the same at all periods, since the Commissaries were first appointed in 1563, down to the present time. The procedure, too, had been always

(a) See Appendix, Note (O.)

(b) Appendix, Note (P.)

so conducted, as not to offend against decency, or lead to the corruption of manners, by the infectious exhibition of profligacy in the higher ranks of society. Hence, the estimation of the privilege of judicial divorce for adultery, was so high in this kingdom, that a few examples of forfeiture, incurred by the innocent act of contracting marriage, under the law of England, could not fail to operate as a discouragement to intermarriage between citizens of Scotland and their fellow-subjects of the British empire, and as a temptation to the former, to prefer illicit connections to lawful union, when residing out of their own country. For, the peculiar and novel hardship of being thus obliged, without fault, to remain united to an adulterous partner for life, would, undoubtedly, be deemed both galling and degrading in the extreme.

Granting, then, that the English municipal rule of law, with regard to divorce, was entitled not only to high consideration, but to an absolute preference, when the real domicil was in England, and when the application of our opposite municipal rule would therefore produce injury to the good order of society, and to the rights of legitimacy and succession in the sister kingdom, there could be no question, that a Scottish judicature must, on the same principles, owe superior regard to these invaluable interests at home. In this action, both parties, indisputably, were Scottish citizens and subjects, who now have, and always have had, their real domicil in Scotland. A decree of divorce against the defender, Mrs. Edmonstone, could therefore, in no possible way, affect the English municipal rule, or operate to its prejudice within the territory, and among the subjects of England. But if it could, the connection between the law of Scotland and its own subjects, must be held infinitely more certain and important. In this situation, therefore, if so extreme a case can be thought ever to have been considered by jurists as doubtful, the *jus gentium*, according to the opinion of Vattel, prohibited the surrender of our own rule.

It had, indeed, been supposed, that questions, by which *status*, or personal condition, may be affected, form an exception *against* the application of the law of the real domicil. But when properly understood, all authorities of public law would, on the contrary, be found to exclude such an assumption. Rights even of immoveable property are not so important to the internal system of a realm, as those which affect the personal condition of the people. As to these last, consequently, the greatest jealousy of foreign interference has always prevailed. It is on this account that natives of other countries, when they emigrate, must submit to the laws affecting personal condition in that territory where they permanently settle. Surely, then, as to native citizens, whose *sole domicil* was within the territory of the jurisdiction at the date of the action, and had never been really constituted any where else, no doubt could be entertained. At least, the footing on which the citizens of all foreign and independent nations stood with England, seemed to furnish proof of this proposition: and the peculiar nature of the connection between the sister kingdoms of Britain had been so established and regulated by treaties and statutes, as to place their several municipal rights upon a much more secure foundation.

By the laws of the United States of America, of Holland, of Prussia, and other Protestant States of Germany, of Sweden, of Denmark, and of Russia, divorce *a vinculo matrimonii* may be granted for adultery. But it could not be alleged that when the marriage of a citizen of any

of these countries had been celebrated in England, the plea of indissolubility by judicial sentence was on that ground ever sustained, or even stated against the action of divorce in the *forum* of his real domicil. It was, however, between separate and independent states, that international law had its proper theatre of action, and became the sole authority. Besides, it had never been denied hitherto, that a *foreign citizen*, who had obtained the divorce of his own law *a vinculo* of a marriage entered into by him in England, might again return to England in any station, public or private, free to marry a second time there. For this innocent and lawful act of a second marriage, a *foreigner* surely could not be apprehended and tried for bigamy under the English statute. On the contrary, in England, where, in a peculiar degree, liberal and enlightened principles of jurisprudence prevail, it was conceived, that his condition of freedom from the former marriage, declared by a judicial decree in his own country, would certainly continue to be respected.

The result in the case of Lolly might appear adverse to this view of the subject; but, in truth, it served only to show to what length the law of the real domicil could be supported and enforced according to the opinion of the twelve Judges of England. Although the wife of that person had obtained a decree of divorce from the proper tribunal in Scotland for adultery committed here, that judgment was given in conformity to the decision and direction of the Superior Court in the previous case of Tewsh, and contrary to the opinions which the Commissioners had formed at the original discussion, and to which, conceiving the point to be again laid open for judicial consideration by virtue of the remit from the House of Lords in the subsequent appeal of Tovey against Lindsay, they unanimously returned. For Lolly was an Englishman by birth, and had his sole domicil in England at the date both of his first and of his second marriage. His real domicil also continued to be in England when his wife sued him and obtained decree of divorce against him in this *forum*. Consequently, whatever defence it might afford to him in the criminal trial for bigamy instituted upon his second marriage, the Scotch decree could not be effectual to dissolve his conjugal relation with his first wife, and as to all *civil* consequences, was invalid, according to the very principles which have been now adopted in the present case of Mr. Edmondstone. There was not, however, any ground to presume, that if Lolly had been a Scotchman, and had never visited England but upon the occasions of his first and second marriage, he could have been lawfully apprehended, and tried for bigamy as soon as the latter was solemnized. On the contrary, the notorious fact, that of all the Scotch parties, frequently in high rank, who have married a second time under the English law during the lives of their original partners, but after obtaining divorce in this *forum*, not one had on that account been subjected to any criminal cognizance or inquiry, proved that no such measure had ever been deemed competent.

It must, indeed, be regarded as impossible, that the validity of a final decree of divorce regularly pronounced by this Court against a defender whose real domicil was confessedly in Scotland, and in an action between parties who were exclusively subjects to the law of Scotland, could be afterwards considered in any English judicature but as a matter of fact like the statutory divorce of the legislature; for, by the treaty of Union between the two kingdoms, it was specially provided in the 18th arti-

cle, that the laws then observed within the kingdom of Scotland, in so far as not changed by that compact itself, should "remain in the same force as before," and, in particular, "that no alteration be made in laws which concern private right, except for the evident utility of the people of Scotland;" and, in the next article, "that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall, and that the said Courts, or any of the like nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same." Even as to matters regarding which all interference or alteration had not been prohibited by these federal engagements, it was not left to the feeble mediation of international law to regulate the intercourse and connection between the two nations of Great Britain. By the same treaty, a Parliament common to both had been provided to legislate upon concerns of such delicacy and moment. But if the principles of international law could be appealed to in the present question, the reasons had been already stated for concluding that these likewise supported the plea of the pursuer.

The other two Judges of the Primary Court were of opinion, that this was an extreme case against the law of the contract, but that nevertheless, the English rule ought to be preferred, upon the principles explained on former occasions, and which they held to be of universal application.

By the rule of Court, in the case of equality, they accordingly gave an interlocutor, [Dec. 9, 1814] which, "In respect it is admitted, that their marriage was regularly solemnized in England, round, that neither the alleged domicil of the parties in this kingdom, nor the alleged commission of adultery here by the defender, can have the effect of altering the condition of the contract between the parties, as indissoluble *secundum legem loci contractus*, so as to authorize this Court to pronounce sentence of divorce *a vinculo matrimonii*."

Upon a bill of advocacy, at the close of the procedure in the Court of Review, (a) Lord Reston, Ordinary, by his interlocutor, [March 5, 1816] remitted to the Commissaries, with instructions to alter the interlocutor "complained of; to sustain the action, and proceed therein according to law." But the pursuer, after a proof had been allowed, compromised the action, by an extrajudicial settlement with the defender.

(a) Appendix, Note (Q.)

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The Honourable Mrs. MARY BUTLER, otherwise FORBES, and Messrs. HOTCHKIS and TYTLER, Writers to the Signet, her Attorneys, v. The Honourable FREDERICK AUGUSTUS FORBES.  
—p. 209.

[March 7, 1817.]

BOTH parties in this case were confessedly Irish; but their marriage had been celebrated at Port Patrick in Scotland, and was of the same description, in all respects, with the marriages of English parties at Gretna Green, excepting that it was solemnized regularly by the cler-

gyman of the parish. They had immediately afterwards returned to their native country, and had lived there during the whole period of their cohabitation. According to the allegations of the pursuer, in her summons and condescendence, the defender had afterwards come to Scotland, and had resided here, without any establishment or fixed abode, from December 1813, to the 14th of March 1814, when he was personally cited at Edinburgh, and, during this residence, had committed adultery in this kingdom. On these grounds, she insisted for divorce *a vinculo matrimonii*.

The defender gave no opposition to the action, although, at an early stage of the process, he made appearance, which he afterwards withdrew.

Two of the Judges of the Primary Court were of opinion, that the decision of the case would depend upon the circumstance, whether the marriage must, in legal construction, be considered as an Irish contract, from the domicil of the parties, or as a Scotch contract, from the place of celebration. An interlocutory order was therefore given (1st July 1814) for the discussion of that point.

After this order had been obeyed by the pursuer, judgment was pronounced in these terms (16th February 1816): "The Commissaries, having considered the memorial for the pursuer, with the protestation admitted against the defender, for not lodging his memorial, and having resumed consideration of the whole process, find, that the circumstances alleged in the pursuer's libel and condescendence are insufficient, if proved, to entitle this Court to hold that the defender had changed his original domicil of Ireland, where he was subject to the English law, so as at the date of this action to have acquired a real and true domicil in this kingdom, his residence in which, for the period alleged, might even have been adopted for the purpose of founding this action: Find, that transient or temporary residence of a foreigner, and citation within this territory, although sufficient to convene him as a defender, and to found jurisdiction, do not, according to the principles of international law, warrant this Court to apply its own law as the rule of decision in a question affecting *status*, so as to entertain a conclusion for dissolving his marriage by sentence of divorce, in opposition to the law of his proper domicil: Find, that the right of divorce is a matter purely of municipal regulation, and to be carefully distinguished from those qualities of marriage which are essential to the relation itself, as a contract *juris gentium*: Find, that all municipal regulations regarding marriage, while they cannot in any way be controlled by the will of parties, are not in their nature indelible, but may be affected by every change in the real and true domicil: Farther, find, that the alleged commission of adultery within this kingdom, does not warrant this Court to apply its own law, with regard to conclusions of divorce against a foreigner; because, in consistorial cases, acts of adultery are founded upon by the pursuer, merely for his private redress *ad civilem effectum*, and, in these cases, the *locus delicti* is of no importance, although in criminal cases, where the offence is prosecuted *ad vindictam publicam*, the *locus delicti* is an essential circumstance: Therefore, assoilzie the defender from the conclusions of the libel, and decern." This interlocutor was accompanied by the following note: "The point to be determined in this case, is the same which occurred in the case of Edmonstone against Lockhart, lately decided by this Court, namely, Whether

the law of the contract, or the law of the real and true domicil at the date of the action of divorce, is to be the rule of decision? In the case of Edmonstone, the Court being equally divided in opinion, agreeable to immemorial usage, judgment went in favour of the defender, who maintained the plea of the contract. If there had been an actual majority of the Court in favour of the judgment, the present case would have been decided in conformity to it; but as there was no majority on that occasion, the decision has not been followed as a precedent so as to regulate the present case, when an equal division of the Court again occurs, and, consequently, the defender here has been successful, although maintaining the opposite plea of the domicil."

By bill of advocacy for the pursuer, this case was submitted to review, along with those of Edmonstone and Levett, and, at the close of the discussions in the Court of Session, it returned, with an interlocutor, remitting to the Commissaries (12th July 1816) "to recal their former interlocutor, to allow the pursuer to prove that the defender was domiciled and resident in Scotland when the action was raised, and also to make what inquiry they may think proper and competent, in order to ascertain whether the present process be collusive, and thereafter to proceed according to law."

The pursuer had been examined at the commencement of the suit, on the point of collusion, under the oath of calumny, and the defender had been personally cited. From the proof now led by the pursuer, the residence of the defender in this country appeared very clearly to have been transient and altogether unfixed. In particular, there was not the slightest indication of any purpose having ever been formed by him to settle in Scotland *animo remanendi*. On the contrary, there was reason to conclude from the evidence, that he had always retained his connection as a citizen with his native country, and had even actually returned to Ireland to settle permanently there.

This judgment was, therefore, pronounced (13th September 1816): "The Commissaries, having considered the whole evidence, now and formerly led, as to the defender's residence and domicil at the date of this action, and having resumed consideration of the whole process,—In respect that the pursuer, in her oath of calumny, emitted in Court upon the 13th of June 1814, has already deponed, "That there has been no concert or collusion between her and the said defender in raising this action, in order to obtain a divorce against him, nor does she know, believe, or suspect, that there has been any concert or agreement between any other person on her behalf, and the said defender, or any other person on his behalf, with a view or for the purpose of obtaining such divorce:" and in respect that these asseverations of the pursuer seem to the Commissaries to exhaust the inquiry as to collusion by means of her oath, and that with due regard to the recent judgments of the Supreme Court in the cases of Newte and O'Bryan against their procurator-fiscal,(a) they are not aware of any other means by which the investigation on that point can be further prosecuted in the circumstances of this case: Find, that there is no sufficient and legal ground for concluding, that there has been any collusion between the pursuer and defender, either as to the defender's residence and domicil at the date of the action, or as to the institution thereof and procedure therein: Having also at-

(a) See Appendix, Note (B.)

tended particularly to the terms of the remit, and to the execution returned on the summons, which bears that the citation was delivered to the defender personally, apprehended on 'Leith Terrace at Edinburgh, upon the 14th day of March 1814,' and considering that personal citation of a foreigner who has no fixed residence or domicile in this country, is attended with the very same effects which would follow from execution left at his dwelling-place after abiding forty days here: Find, that the general instruction of the Superior Court, to allow the pursuer a proof of the defender's domicile at the date of the action, must imply, that it was further incumbent on the pursuer to prove, that the defender then had a real, and not merely a presumptive, domicile in Scotland: Find, that, in point of fact, both parties are confessedly natives of Ireland; and, according to the import of the whole evidence of the pursuer in this cause, must be held to have retained their real domicile exclusively in that country, both at the time of their marriage, and during the whole period of their cohabitation as husband and wife: Find, that the evidence now led by the pursuer only tends further to prove that the defender came to the hotel kept by Francis Mackay, in this city, by the mail coach from Carlisle, on the 25th of December 1813, and remained as a lodger at that hotel, and afterwards at different lodging houses here, from week to week, without any domestic establishment, the only person with him being a female, with whom he lived at bed and board, but who was not the pursuer his wife, till some time in April or May 1814, when he left this city, in order, as he gave out, to go to his brother the Earl of Granard, in the kingdom of Ireland, with the hope of obtaining employment in the office held there by that nobleman: In respect that such mere presence, however long continued, of a foreigner in this country, as may suffice to found jurisdiction, does not necessarily and always infer that the law of Scotland must apply its municipal rules upon questions where he is a defender, in preference to those of his own country, and that our law, on the contrary, as in the case of intestate personal succession, allows inquiry likewise to be made as to the real domicile, and, upon principles of international law, adopts the foreign rule of that domicile when this course may seem just and expedient: And, in respect also, that a change of the real domicile, made *bona fide et animo remanendi*, at the date of the action, seems, in a peculiar degree, requisite to authorize the adoption of our municipal rule in preference to that of the Irish law upon a question by which this Irish defender's *status* of husband is affected, Find, that the pursuer has not established, by evidence, that the defender held that real domicile, at the date of this action, which was requisite to be proved. *Separatim*, find the allegation that Scotland is the *locus delicti* or *rei gestæ*, in respect the defender committed adultery here, of no importance or relevancy to the present question, because, in consistorial processes of divorce, acts of adultery are founded upon merely *ad civilem effectum*, and for redress to the private parties injured, and decrees have accordingly been hitherto pronounced in these by this Court, without distinction, whether the crime had been committed in Scotland, or in any other country of the world, although, in criminal causes before the competent tribunals, where the crime of adultery is prosecuted *ad vindictam publicam*, the *locus delicti* is an essential circumstance: Therefore, assoilzie the defender from the conclusions of the present action, as laid for divorce *a vinculo matrimonii*; but, in respect there is no rule of the law of Scotland which prohibits the Com-

missaries from granting a decree of separation *a mensa et thoro*, and for separate aliment to this pursuer, on the grounds alleged in her libel, while a decree so qualified would correspond with the principles of international law, appoint the pursuer to state whether she will restrict her conclusions to this inferior remedy."

By minute, the pursuer declined to restrict her conclusions, and the action was dismissed by the Primary Court [October 18, 1816].

The reasons of the judgment were likewise fully explained in this case, and were the same with those which had been assigned in deciding the case of Levett, except as to the circumstance, that the marriage had been celebrated within the territory of Scotland.

Upon this point, it was observed by the Judge officiating in Ordinary during the vacation of the other tribunal, that, beyond all doubt, the parties had, in the act of their marriage, intended that the relation of husband and wife should be constituted between them to subsist, not in Scotland, but in Ireland; and that in Ireland all the conjugal duties and obligations should be reciprocally performed. They had likewise their domicil in Ireland at the date of their marriage, and had cohabited together only in that country. Even if the law of the contract were to be preferred, it must follow that the municipal law of Ireland should regulate in the present question; for the parties had visited Scotland merely to marry; and when their union was accomplished, their connection, if it could be so called, with Scotland, which had taken place for no other purpose, had altogether ceased.

It was also now ascertained, by satisfactory evidence, that the defender continued to have his real domicil in Ireland at the date of the action; for the pursuer's own proof had established this fact. And that circumstance alone was sufficient to decide the case, by rejecting the conclusion of the pursuer for divorce *a vinculo matrimonii*, according to the municipal rule of the Scottish law. Such, at least, must be the necessary inference, if it could not be maintained, that the Scottish rule of divorce was impressed upon the contract of these parties as an essential quality of their marriage, because it had been celebrated at Port Patrick. But that proposition was directly opposite to the doctrine of the municipal laws, both of Scotland and of Ireland,—indeed, of all nations.

The Scottish ceremony of marriage, no doubt, differed from that of the English and Irish law, as to the ritual. It was not requisite by the former, that the marriage should be solemnized at the parish-church of the parties. Nor was any permission requisite in this country, to enable persons of lawful age, and not within the forbidden degrees of relationship, nor affected by any personal disability, to marry.

But a marriage, solemnized according to the rule of the place of celebration, however peculiar that municipal rule might be, was, by the law of nations, valid in all other countries. In other words, like every other contract *juris gentium*, marriage, wherever celebrated, had the same consequences and effects in any other country, to the law of which the spouses might be afterwards subject, as if it had been celebrated under that law. Thus, a marriage of English parties, made at Gretna Green, on the Scotch side of the Border, without form or solemnity of any kind, except a mutual and deliberate declaration of consent by the parties before witnesses, was received in England just in the same manner as if it had taken place there, with every condition of the English

law and ritual.(a) That of Irish parties at Port Patrick was precisely on the same footing.

While such was the view of the English law, it was surely impossible that a different construction could be adopted in Scotland as to the quality of a marriage, on account of the place where it had been celebrated. For the recent decision in the case of Edmonstone had established, that the *lex loci contractus* was of no obligation here in the case of Scotch parties married in England. Without departing altogether from the principle of that decision, the judicature of this country could not, therefore, now regard our municipal rule as an essential quality of the marriage between these Irish parties, on account merely of the place of celebration, a circumstance which had been found of no weight in the case of citizens of Scotland, who had married within the bounds of the sister kingdom of England.

The *locus delicti*, it has been previously ascertained was of no consequence whatever in the civil action of divorce. If, then, the place of celebration were also to be laid out of view as unimportant, it was evident that either the municipal law of the jurisdiction in which the cause came to be tried, on account merely of the defender's citation or the municipal law of his real domicil, must govern the decision. But unless the authority of international law, and with it all regard to foreign contracts and rights, should be entirely disclaimed in this *forum*, as to questions affecting the conjugal relation, the latter must, on this occasion, be preferred.

A second bill of advocacy was presented, [Feb. 21, 1817], upon which a remit by Lord Cringletie, Ordinary, was obtained, directing the Commissaries to alter their interlocutor, and proceed in the divorce.

In obedience to this instruction, upon full proof of the defender's guilt, decree was [March 7] accordingly pronounced, in terms of the libel.

(a) Appendix, Note (R.)

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Mrs. LUCY KIBBLEWHITE, otherwise ROWLAND, and her Attorney, v. DANIEL ROWLAND.—p. 226.

[April 7, 1817.]

IN this action of divorce, which was moved in Court, and entered in the roll upon the 28th of October 1814, the defender made no appearance. The pursuer, in obedience to an order upon her to condescend, explicitly stated, that both of them were citizens of London, where they had been married in the year 1807, and where only they had cohabited, her husband following the profession of an attorney in that city. But in the month of August 1814, he had, according to her allegation, departed upon a jaunt to the English Lakes. Afterwards, he had proceeded to Edinburgh, whence he wrote to a female in London, whom the pursuer named, with directions to come to him; and this person having complied with his request, it was farther asserted, that they had lived together in adultery here, till the summons was served upon him personally at the hotel in which he lodged, on the 5th of October 1814.

It was only added, that the defender, so soon as he received this citation, returned to England.

Thus, there was no reason given to presume, that either of the parties ever had any connection with Scotland, except the defender's visit, for a period not exceeding six or seven weeks, during an autumn vacation, in the course of which time the ground for the action of divorce had been laid and communicated to his wife, so that she was enabled to convene him in the Consistorial Court of Scotland, before the approach of the term required his presence again in London.

Upon this case, as it stood by the pursuer's own statement, the Judges of the Primary Court were unanimously of opinion that the following interlocutor should be pronounced (26th July 1816): "The Commissaries, having considered the condescendence for the pursuer, and resumed consideration of the libel, execution, and certificate of marriage produced; in respect that both parties appear to be natives and citizens of England, and that the defender confessedly is an attorney of Gray's Inn, London, and was married to the pursuer at London in the year 1807, and has since cohabited with her in England till the month of "August 1814," when, as she alleges in her condescendence, he left her at their dwelling-house in London, "to visit the Lakes in Cumberland;" and in respect that the pursuer merely alleges further in this condescendence as to the defender's domicile and residence at the date of the action, that the defender "proceeded to Edinburgh, and arrived at Mackay's hotel on the 26th of August, and afterwards went with his servant to reside at Newhaven," where the execution returned upon the summons bears that he was personally cited "in Simpson's hotel, or lodgings, on the 5th of October 1814," to appear in this action; while she also states in her condescendence that the defender lodged "at Mrs. Simpson's at Newhaven," but that, "finding himself pursued into Scotland, and made the subject of prosecution there, he departed into England:" Find these allegations, proved, clearly irrelevant to establish any change of the defender's real domicile in England, and, consequently, that these cannot be admitted to proof: *Separatim*, find the only other allegations of the pursuer's condescendence, that the defender "wrote to one Lucinda Wilson in London, and she immediately came to Scotland by the mail-coach. The defender received her in Edinburgh at Mackay's hotel, and falsely represented her as his wife, Mrs. Rowland. He next took her to his lodgings at Mrs. Simpson's at Newhaven, and there also represented her as his wife," and that they "slept together one night in Mackay's hotel; and that they cohabited together openly at bed and board for some time at Newhaven," are of no importance or relevancy in the present question; because, while these allegations, if proved, would establish with respect to the guilt of the defender, that, in point of fact, Scotland has been the *locus delicti* or *rei gestæ*, by the rules and practice of our law in consistorial processes of divorce, acts of adultery are founded upon merely *ad civilem effectum*, and for private redress to the parties injured; and decrees have accordingly been hitherto pronounced by this Court without distinction, whether the crime had been committed in Scotland or in any other country of the world, although, in criminal causes before the competent tribunal, where the crime of adultery is prosecuted *ad vindictam publicam*, the *locus delicti* is an essential circumstance: Therefore, and in respect that the marriage of the parties was indissoluble by judicial sentence, according to

the law of England, which was both the *locus contractus* and the country in which the parties have always had their real domicile: Refuse to sustain the conclusions of the present action as laid for divorce *a vinculo matrimonii*: But in respect there is no rule of the law of Scotland which prohibits the Commissaries from granting a decree of separation *a mensa et thoro*, and for separate aliment to the pursuer, on the grounds alleged in her libel, while a decree so qualified would correspond with the principles of international law, appoint the pursuer to state whether she will restrict the conclusions of her libel to this inferior remedy."

In addition to the reasons which were thus entered upon the record, it was observed from the Bench by the Judge officiating in Ordinary when this interlocutor was given, that, although the whole Court had been of opinion, that there was no difference between this case and the preceding case of Levett, and those of the other English parties, which had been recently decided, with respect to their legal merits; yet, in its circumstances, it certainly reached the extreme point to which the exclusive application of the municipal law of the jurisdiction could be carried. For, if the alleged criminal connection of the defender with Lucinda Wilson, the person mentioned in the pursuer's condescendence, had subsisted only in London, and if he had proceeded no further upon his jaunt than merely to cross the Tweed, and had been served with a citation by the macer of this Court on the instant that he reached the northern bank of that river, the action would have stood upon more fair grounds, although supported by no other imaginable connection of either party with the country or law of Scotland than it actually now does.

In this hypothetical case, the pursuer might have made such a seizure of an English party to found the Scottish consistorial jurisdiction, with her summons of divorce, entirely by surprise; and thus there could at least have been no reason to suspect any concert or collusion between them. But, on the contrary, the proceedings of the defender in this case, and the minute information of these, which the pursuer had obtained, did savour very strongly of arrangement to found and carry through the present suit in this judicature.

Nevertheless, the mere circumstance that a guilty husband might happen to have no wish to preserve his marriage from being dissolved, could as little afford an objection to the suit of the wife on the ground of collusion in the case of English parties, as in the case of parties who were natives of this country. In either case, the right of the wife to such redress as might be competent, could only be barred by her own acts and conduct. Satisfactory evidence that she had, directly or indirectly, entered into a concert with the defender to procure the dissolution of their marriage, was, therefore, requisite to authorize the dismissal of her suit on the ground of collusion, as that objection has always been understood in the law of Scotland. Many decisions which had been pronounced at all periods, from the date of the institution of the consistorial judicature, united to prove this proposition. Indeed, when the husband, as in this instance, happened to be the defender, he often showed no aversion to the success of the suit. But the action could not be affected by his wishes; and various recent judgments of the Superior Court had furnished strong illustrations of the rule of our municipal law on this head, which in itself might be held unquestionable. It would, however, in the present action, be both competent and necessary to examine the pursuer fully as to collusion under the oath of calumny, and if, by that

mode of inquiry, or otherwise, sufficient evidence of her accession to any collusive practice could be obtained, the process must be dismissed. Yet without disregarding the whole course of previous practice, it was impossible at this stage to reject the suit upon an assumption that it was collusive. That point had consequently been left untouched by the present interlocutor.

Grounds altogether different had occurred, for declining to sustain the pursuer's conclusion for divorce *a vinculo matrimonii*. The interlocutor contained such explanation of these as had been conceived by the Court to be requisite to be entered upon the record. But the peculiar circumstances of this extreme case seemed to illustrate, in a manner so striking, the importance and necessity of abstaining from the exercise of the power to give decree of divorce to the extent of dissolving an English marriage, in opposition to the law both of the contract and of the domicile of the parties, as to call for some further notice.

If Mrs. Rowland, who appeared never to have visited Scotland in her life, and who certainly never cohabited with her husband in this country, nor had a domicile here, is entitled to a decree of the Consistorial Court of this country, dissolving her English marriage, because he has committed adultery, and has resided for a few weeks at this place, during which her summons was served upon him; then, beyond all doubt, such a decision not only must invite, as by open proclamation, all other spouses of every nation, who wish to obtain divorce *a vinculo* by judicial sentence, and cannot accomplish that object under the rule of their own law, to resort to this jurisdiction, but also must have the effect of a regulating precedent to compel this Court, in future, to entertain all their actions of divorce indiscriminately.

It were vain to hope that the plea of collusion might be employed to resist these intruders. For parties must always be aware of the nature of the oath to be taken, and would arrange their conduct to meet that test. When informed as to the state of our law, it was likewise plain that no motive could exist for their entering into any actual concert. The commission of a crime by the defender, on which the action might be laid, and his presence here to receive a citation, would alone be found requisite. Information of these circumstances might reach the pursuer without the direct knowledge, if not contrary to the wish of the defender, in a thousand different ways. Why, then, should any pursuer hold unnecessary communication, which could have no other possible effect but to defeat the action of divorce? Conduct so absurd was not to be expected; and, perhaps, if this very case were to proceed, it might be ascertained that Mrs. Rowland stood as clear of collusion as any party that ever sued for divorce, although it could scarcely be doubted that her husband had, of deliberate purpose, thrown in her way the temptation and the opportunity to prosecute for divorce *a vinculo*, as a result equally desirable to both parties.

This Court, if compelled to proceed, must also, upon evidence of the crime, be compelled, *debito justiciæ*, to give decree. Presence to receive a summons, and guilt as the ground of conclusion against themselves, were the only requisites in causes of this description. These, it was to be presumed, that defenders in such causes would contrive to supply, at the peril of their partners in crime and of themselves, and also to the prejudice of this community, whose morals they must taint

and infect. What must next follow, as the inevitable consequences of divorce, thus generally proclaimed and bestowed? Subsequent marriages of strangers, set at liberty in this manner from their first engagements, would lead to criminal prosecutions for bigamy, of which there had been already one most painful example, in the case of Lolly, and to afflicting contests upon the rights of legitimacy and of succession among the innocent children of their new connexions. It was likewise a self-evident proposition, that these evils, in their worst and most aggravated form, could not fail to affect, in a very peculiar degree, the people of Great Britain, where such collision of the laws, if permitted, must take place between two countries within the same empire and island, and must continue to increase till the Legislature shall provide a remedy.

It might, however, be still argued, that the present question was, in truth, one affecting the right of jurisdiction, which no court could surrender, without betraying its duty.

This point, therefore, remained to be considered, and in the discussion, it might be safely conceded, that, if the sole alternative really were either to refuse all redress for conjugal wrongs, in the case of parties who have no real domicil in Scotland, when convened in this *forum*, or to give that highest species of redress only which our municipal law had provided for its own subjects, there might then be ground for maintaining, that the right of jurisdiction would be virtually surrendered by declining to award divorce *a vinculo matrimonii* for adultery, in the circumstances here alleged.

But, upon a former occasion, the reasons were stated for concluding, that this Court had also power to give the remedy of separate aliment and separation *a mensa et thoro* for adultery, in correspondence with the rule of the law of the contract and domicil of English parties, when such remedy shall be sought.

In either way, therefore, the right of jurisdiction might be exercised; and the choice between them ought to be determined according to the principles of justice and expediency, supposing them to be clearly on one side, and the question to be open. Now, there could be no doubt in the abstract, that it was both just and expedient, in the present case of English parties, not to exceed that measure of redress which their own law permitted. And it had appeared, that, previous to the date of the case of Utterton against Tewsh in 1811, there was no precedent in any contested question upon the point. The remit by the House of Lords, in the subsequent case of Lindsay against Tovey, held it to be undecided, and the directions of the Superior Court of Scotland, given in the interlocutors of remit upon the recent cases of Levett and Forbes, as to the defender's domicil, had merely required the Commissaries to ascertain what was its real quality at the date of the action.

In the present case, it was not less clear, that the real domicil of the defender was, according to the pursuer's own allegation, in England, than that their marriage was an English contract. Nor could it be denied, that all ordinary civil contracts and transactions entered into abroad, receive effect from the law of Scotland, according to the rule which obtained where they were entered into.

Questions affecting the conjugal relation or other personal condition of parties, formed, indeed, a peculiar class. But the difference was

merely that, as to these, the law of the real domicile must govern; since, otherwise, the internal arrangements of each municipal system would be constantly exposed to danger from the interference of the judicatures of the neighbouring countries. This collision, too, would always occasion prejudice to both nations. At least, that this must be the consequence in the case of the sister-kingdoms of Great Britain, there could be no doubt. For it must be not less injurious to our own moral and social interests, to invite English strangers fraudulently to seek the privilege of divorce here, by the commission of adultery, than the consequences of decrees of dissolution of the marriages of English subjects valid here, but not respected in England, must be injurious to our neighbours.

The circumstance that there were peculiar statutes of our criminal code against adultery, afforded no specialty by which the claim for the application of our municipal rule in a case of divorce, between strangers from another kingdom, could be supported. A forgery at Edinburgh of a title to an English estate, by a stranger from England, would authorise the conviction and execution of the perpetrator by our criminal law; but certainly would afford no pretence for a civil judgment in this *forum* as to the effect of the forged title, to establish a right in the lands to which it related by our civil court, according to the municipal law of Scotland. We had statutory penalties for usury, as well as for adultery, by the criminal law of Scotland, and remedies, likewise, by civil action, and for reparation to private parties. Yet justice was administered to foreign parties, and as to foreign contracts upon pecuniary claims, by the rule of the foreign law. Neither was the circumstance of any importance, that adultery is in its own nature a crime, while usury is only penal by statute. For the separate provinces and boundaries of the criminal and civil laws were perfectly distinct, and the latter could derive nothing from the former in a question of divorce. If the act of the Scottish Parliament, anno 1563, cap. 74, were still in observance, supposing it to be proved that Mr. Rowland had lived in open and flagrant adultery with Lucinda Wilson, the person condescended upon by the pursuer as his partner in guilt, he would be liable to capital punishment. He is liable, if apprehended and convicted, to those penalties of our criminal code, which are still competent. It was in this manner that the criminal law of Scotland protected the people of this kingdom against the injury and pollution which their morals might sustain by the guilt of strangers.

No doubt, in the department of criminal justice, our municipal system could not suffer its own regulations to be impeded by any plea drawn from rules of another code, without compromising its independence and sovereignty. Here it avenged for the public, in order to repress guilt by suitable punishment, and because the crime had been committed within that territory of which it is the guardian. Therefore, while the criminal law took no cognizance of delinquencies which have occurred any where else, it admitted of no interference as to these within the limits of its own exclusive jurisdiction. On the contrary, the civil law of Scotland, in adjudging reparation to a private party, looked only to the nature of the right, and of the claim which is the subject of the suit. No public interest of the community in Scotland, for example, could be directly affected, whether Mrs. Rowland persevered in this individual action or abandoned it, or, whether persisting, she should obtain a dis-

solution of her marriage, or only a separate aliment and separation *a mensa et thoro*.

Was the alternative, however, matter of equal indifferency in other views, and with respect to the law of England? On the contrary, reliance upon a decree of divorce, if granted here *a vinculo matrimonii*, might produce second marriages of these parties in England, and thus expose their persons to the pains of bigamy, and their offspring to the most serious calamities. The precedent also would involve an alarming collision between the laws of the two countries of this Island. It was, therefore, inexpedient to pronounce such a judgment without necessity. It would be unjust to do so, since the conjugal relation between these parties, with its consequent rights and duties, in truth remained under the regulation of the English law, and must still be held locally to subsist at their real domicile in England, rather than here.

In this predicament, our jurisdiction could be endangered only by exercising it erroneously. But considering the relative situation of the two kingdoms, it was not difficult to foresee, that if we were to assume, that the possession of power to try and decide cases of divorce between English parties in this *forum*, likewise implied a necessity to disregard the rules of the law of England, and were, in consequence of this assumption, to do violence to the municipal system of our neighbours, and thus to produce uncertainty and confusion in the most important concerns of civil society and of human life, among the people of the British empire at large, the subsistence of such a jurisdiction might be considered not as a benefit, but a calamity. (a)

Apprehension of such a consequence, could indeed afford no good reason to a court of justice for not applying the law as it now stood. But it was conceived, that the interlocutor upon the general question, all the points of which had again occurred in this particular cause, was the fair result of a consideration strictly judicial, and in no respect extending beyond the limits of the legal arguments and investigation. For unless the authority of international law were to be altogether rejected, it was not only proper but indispensable, to inquire with freedom, as upon an open subject, whether our municipal rule, which permits divorce *a vinculo matrimonii* for adultery by judicial sentence, or the opposite rule of the English law, should be preferred in a case depending between English parties who had no domicile in Scotland. Sufficient reasons had been found for concluding, that, especially with regard to the decision of a suit affecting their conjugal relation as it subsisted in their own country, respect was due in this *forum* to the rule, which was established in the neighbouring kingdom of the empire. At the same time, redress for the injuries she alleged might be given to the pursuer here, which perfectly corresponded in principle and material effect with the rule of her own law. In this manner, too, while the jurisdiction, according to the law of Scotland, possessed by the Consistorial Court, was exercised to its full extent, and in the way which was upon the whole most beneficial, as well as most just, the municipal systems of both kingdoms would be securely preserved from all risk of violation, or prejudicial interference and collision, in a department of peculiar importance in the administration of civil justice.

The judgment of the Commissaries was submitted to review, by bill

of advocacy for the pursuer, and Lord Cringletie reported the case to the First Division of the Court of Session at her motion, along with that of Levett. But it was there remitted to the Second Division of that Court. Afterwards, both cases were decided together, and this deliverance was given in conformity to the opinions of the Judges (*a*) (21st December 1816:) “The Lord Ordinary, having again considered this bill and former procedure, and advised with the Lords of the Second Division, remits to the Commissaries, with instructions to alter their interlocutor, and to proceed in the divorce according to the rules of law.”

In obedience to this instruction, the pursuer was fully examined under the oath of calumny, with a view to ascertain whether there had been collusion, and she not only gave answers which were explicit and satisfactory to all questions upon this head, but also produced a letter received by post during her husband's absence in August 1814, which bore all the marks of authenticity, and which she deponed had conveyed to her the first information of her husband's guilt. A proof was, therefore, allowed, and the action afterwards [Feb. 14, 1817. April 7, 1817] proceeded in common form. (*b*)

(*a*) Appendix, Note (T.)

(*b*) Appendix, Note (U.)

## APPENDIX.

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Note (A.) p. 349.

THE decisions, of which the following brief summary is given in illustration of the point upon which reference has been made to them in the text, are to be found at the places indicated by their dates in the MS. record. During the whole discussions since the general question came to be agitated, as well as in preparing this compilation, the reporter has derived valuable assistance, which he takes this opportunity gratefully to acknowledge, from a MS. Dictionary of Consistorial Decisions, and separate abridgment of the cases, collected by Lord Hermand while he officiated as a Judge of the Commissary Court, beginning upon the 19th of July 1684, and ending in the year 1777: Also from another MS. dictionary, beginning in 1684, and ending in 1744, collected by the late Mr. Murray of Henderland, while he held the same situation: And likewise from a MS. collection of consistorial cases selected from the records of the last century by the late Mr. Cay, while officiating as a Commissary, previous to his appointment as Judge of the Court of Admiralty.

Although the decisions of previous date to the case of Tewsh only could be referred to while it was under discussion, in order that the whole series may be presented together in one unbroken view, those which have been pronounced since are also included in this note.

27th February 1692.

### LAUDER *against* VANGHENT.

THE pursuer, Colonel Lauder, when serving as a Scotch officer in the army of the seven United Provinces of the Low Countries, married the defender, a Dutch lady, at Bommelwert, in Guelderland. During the whole period of their cohabitation, they resided exclusively in the Low Countries. But Colonel Lauder having afterwards returned to reside at his estate in Scotland, and having left his wife in her native country, he raised an action of divorce against her before the Consistorial Court of Scotland, on the ground of adultery, which crime he alleged that she had committed in Holland. The summons was served edictally, (a) and she made no appearance. A proof was allowed, and taken upon commission abroad; and the evidence being found satisfactory, the decree of divorce *a vinculo matrimonii* was pronounced in the usual form.

(a) An edictal citation is given to defenders out of the kingdom, by proclamation at the market cross of Edinburgh, and pier and shore of Leith.

2d February 1693.

*MONTGOMERY against MARSHALL.*

ANNA MONTGOMERY, the pursuer, was a Scotch lady, who had been married in Scotland to Captain James Marshall, of New Portown, in the county of Armagh, and kingdom of Ireland. She cited him edictally as residing out of this kingdom upon a summons of divorce, in which he was accused of having committed adultery while in Scotland with his regiment; and no appearance being made for the defender, a proof was allowed, and his guilt being established by evidence, decree was afterwards pronounced, in terms of the libel.

2d March 1698.

*WHARTON against MAIR.*

IN this case, the action concluded for divorce, reduction, and declarator of nullity, on the ground of a previous marriage. The defender was an Englishman, resident in London, and the pursuer, who resided in Scotland, and was by birth a Scotch lady, convened him in the Consistorial Court at Edinburgh by edictal citation; and having taken her proof by commission in England, obtained decree against him in absence.

1st November 1698.

*BRIDGET BOLD against SAMUEL WRIGHT.*

THE defender in this case was an Irishman, and the pursuer, a native of Edinburgh, obtained decree of declarator of nullity and divorce against him, on the ground of a previous marriage, in an action upon which he was cited edictally, and in which a proof was taken by commission at London, where his first marriage had been celebrated.

9th June 1699.

*GORDON against ENGLEGRAAFF.*

WILLIAM GORDON, the pursuer of this action, was a merchant of Aberdeen, who had been a factor at Campvere in Holland, and had married the defender, Anna Margareta Englegraaff, daughter of a merchant at Amsterdam. He accused her of adultery during their cohabitation at Campvere, and with his summons produced "an instrument and protestation in the Dutch language, under the hand and subscription of William Van Rugven, notary public, dated the 28th day of July 1698 years, attested by two other notaries within the town of Delft the said day, propositing, that William Gordon made known to Anna Margareta Englegraaff his going to Scotland, and told plainly he was to go with a design as soon as he was arrived there, to raise process of divorce against his said wife, requiring her, by his marital power, to follow and bring her son alongst with her; and that she might have no ground of excuse, he, the said William Gordon, appointed her John Gordon at Rotterdam to provide for her transport, and a place at Edinburgh for lodging, till law should determine betwixt them." This invitation having been declined by the lady, the pursuer, in his action of divorce, "supplicated and obtained from the said Commissaries a commission addressed to John Storbac, Burgomaster at Rotterdam, &c. to take and receive the oaths and depositions of all such habile and famous witnesses living in and about the city of Rotterdam, as the said pursuer or any in his name should adduce, for proving against the defender the crime of adultery and other circumstances and qualifications libelled;"

and the proof having been taken and reported, with other evidence of her guilt, decree was pronounced against her.

7th January 1702.

**HAMILTON against BROWN and HAMILTONS.**

IN this case the pursuer obtained a decree of declarator of nullity and illegitimacy against the alleged wife of his deceased brother and her children, upon the ground that she had been previously married to another person. She was an Englishwoman, and both marriages had been celebrated in England. The pursuer and his brother were natives of Scotland, and the pursuer had his domicile in this kingdom. The citation given was edictal; but the defender appeared, and produced a counter action of declarator of marriage and legitimacy. And, in both actions, a proof was taken by commission in England.

16th December 1726.

**GRAHAM against WILKIESON.**

JAMES GRAHAM of Gartur, in the county of Stirling, and Elizabeth Wilkieson, daughter to Captain Philip Wilkieson of Ballinahinch, in Ireland, the parties in this action, were married in Ireland. During their cohabitation at the pursuer's house in Scotland, she committed adultery, and afterwards eloped and left the kingdom. She was cited edictally as forth of Scotland; and, upon proof of her guilt, decree of divorce *a vinculo matrimonii* was pronounced against her in absence.

6th March 1731.

**SCOTT against BOUTCHER.**

THE parties in this case were married at Westminster, and the defender was an English lady. They cohabited together in England, and she was accused of having committed adultery there. Upon this ground, the pursuer, who was a Scotchman, instituted an action of divorce against her, in the Consistorial Court of Edinburgh, and having cited her edictally as out of this kingdom, his oath of calumny was taken at the commencement of the judicial procedure, at his residence in London, upon commission, by "George Ritchie, Esq. Secretary to the Duchess of Buccleuch;" and, upon proof of her guilt, taken there in the same manner, decree in absence was pronounced against her.

11th June 1745.

**DODDS against WESTCOMB.(a)**

WILLIAM WESTCOMB, an Englishman, who had an office in the Exchequer in Scotland, and had, for some years, resided in Edinburgh, having given up his office, and retired to England, a process of declarator of marriage and adherence was brought against him by Rebecca Dodds, before the Commissaries of Edinburgh, with a conclusion, that, failing his adherence, he might be decerned in a certain sum, in name of aliment; wherein appearance having been made for him, with a declinature of the Commissaries' jurisdiction, as he was neither a native of the country nor had either residence or effects in it, the Commissaries "repelled the declinature, allowed the pursuer to prove her marriage;" and, after proof led, "found the marriage proved, and decerned," &c.

He then presented a bill of advocacy, which was informal, after de-

(a) Kilkerran, p. 213, *vace Forum Competens*.

cree; but the pursuer waved that objection; and upon consideration of the merits of the case, the Lords “repelled the declinature.”

This (according to the report of Lord Kilkerran) they did, not upon the general ground, which had been chiefly argued for the party, that the *locus contractus* founds a *forum*, though some of the Lords were for carrying it that length, the more general opinion being, that the *locus contractus* no otherwise founds a *forum* than when the party is summoned upon the place. But what the Court proceeded on was, that here was a *quæstio status*, which might involve the pursuer into inextricable difficulty, were it to be governed by common rules; that it might be true, where the marriage is solemnized in one country according to the established forms of that country, it will be sustained in whatever other country it be brought under challenge, though the form of solemnization may be different in that country; but that it was a different question, whether every thing that infers marriage in one country, will, in another, be sustained to infer it; and one instance was given, in the case of Colonel Murray, when, though his marriage was sustained by a solemn decree of the Commissaries of Edinburgh, upon a proof of habit and repute, and cohabitation with the woman as man and wife; yet, in England, that decree was disregarded, and his marriage found not proved, which was taken notice of, not to justify the practice of England, in disregarding the decrees of another country, as they ought rather to show the same *comitas* to us that we do to them, but to show the hardship of obliging the pursuer to resort to England to prove her marriage, where, in all likelihood, she must fail, and remain under the reproach of being a whore, and her child a bastard, though she was really a married woman by the law of Scotland, where she entered into that state.

It was for this reason of expediency, on which all questions in the public law, and especially the *quæstiones status*, are to be judged, that the Court in this case proceeded, though some were for sustaining the declinature, as we were not to do wrong, out of fear that the judges of another country might do so. (a)

20th June 1750.

GEORGE YOUNG v. MARGARET CASSA.

IN this case the parties had been married at Leyden in Holland, and the defender was accused of having committed adultery at the Hague and at Paris. The pursuer was a Scotchman, but having entered into the medical service of the army, was in Ireland when the usual order was given for his deponing *de calumnia* at the commencement of the procedure, and a commission was granted for taking his oath to the Lord

(a) The report of this case, which is copied from the collection of Lord Kilkerran, shows to what length the right of jurisdiction was maintained in this country towards the middle of the last century, in questions where the *status* of citizens of this country was at stake. Fifty years afterwards, the decision in the case of Pirie v. Lunan, 8th March 1796, went to a greater extreme upon the same grounds. But the judgment of Sir William Scott, in the recent case of Gordon v. Dalrymple, and the previous English decision which established, that marriages of English parties, contracted in Scotland *secundum legem loci*, but in the celebration of which the conditions of the act of the 26th Geo. II. cap. 33, had been altogether disregarded, were, nevertheless, valid in England, seem sufficiently to prove, that there is no longer any just ground for apprehending that the law of Scotland will not be respected by the judicatures of England, in a question relative to the validity of a Scotch marriage.

Mayor and Aldermen of Dublin, &c. although this measure was opposed by the defender. Afterwards, a commission was granted "to Mr. William Robertson, merchant at Rotterdam," to take the proof in Holland, "whom failing, by absence or refusal to accept, to the Lords and Masters the Schepins of the Hague, or any one of them." But the law of Holland did not permit the local magistrates and judges to give effect to a commission granted, in the first instance, to a private person not possessed of authority, to compel the attendance of witnesses, and to take the evidence, so as to subject them to the pains of perjury in case of false swearing. This fact being regularly certified, a new commission was accordingly granted (12th December 1749), "Unto the Right Honourable and the Right Worshipful the Lords, Burgomasters, Schepins, Magistrates of the Hague and of the city of Leyden respectively," to take the proof for both parties, "and that at the Hague and Leyden respectively, upon all or any of the lawful days betwixt the 20th of January and the 10th of March then next," with a request, that they would "be pleased to make a report of the whole to the said Commissaries, betwixt and the 25th day of March then next."

Having entered upon the execution of this commission, the Lords, Burgomasters and Schepins of the Hague, addressed a letter, at the expiry of the limited time, to the Commissaries, in which they stated, that they "did not incline (considering the way this commission was expressed) to refuse complying therewith." But after mentioning what progress they had made, observed, "We have reason to believe, that the entire fulfilment thereof cannot be completed in the time limited in your said commission, viz. before the 21st of the instant March, especially in as much as we are obliged to give ten days warning to the parties concerned, for adducing of such witnesses as might not have been summoned at first, or that happened not to be contained in the list inserted in your commission, and whose depositions may nevertheless be useful to your end and design, as appears from the information of those we have already received; and as there would need much longer time *in order legally to compel such as would not compear willingly, in case any such should be found hereafter*, we forbear giving your Lordships a more full detail of the present state of the affair and of its progress, having judged it only proper to give you this information of its commencement. And upon the petitions of Messieurs the agents for Mr. George Young to represent to you, that a prolongation of your time fixed in the foresaid commission, will be necessary for its entire fulfilment. And that, in consequence, we therefore would wish, for the foresaid reasons, that you would grant a proper prolongation, since, having begun this thing, we would be willing to see it ended to your entire satisfaction," &c.

The commission was of course renewed, and it was executed in a very accurate and satisfactory manner, and the guilt of the defender being fully established by the evidence, decree of divorce was pronounced in the usual form. (a)

(a) By the law of Scotland, testimony given by a witness not cited is liable to objection, as *ultraneus*, and as no warrant for citation is valid *extra territorium judicis*, the attendance of witnesses must depend upon their own pleasure in cases of commission for proof out of this kingdom, when the local authorities of other countries have not power, or are not in use to afford them assistance. But, it is evident, that *comitas* in this respect is very essential to the administration of justice. Between countries within the same island and empire, the nations in-

10th February 1759.

**M'CULLOCH against M'CULLOCH.**

IN a process of declarator of marriage, the pursuer proved, that the defender had cohabited with her for several months in the Isle of Man, and during this cohabitation, had there acknowledged her to be his wife. She also proved, that having afterwards returned to her family in Scotland, she was visited by the defender, and that he enjoyed the privileges of a husband in this country. But there was no proof of consent to a marriage *de presenti* by the defender in Scotland, or even of acknowledgment of marriage by him here, and no sufficient evidence that the parties were habit and repute married persons in this country. The Commissaries, upon the ground, that the cohabitation and acknowledgment in the Isle of Man could only receive effect according to the law of the place, and did not there constitute marriage, assoilzied the defender. A bill of advocation being presented to the Court of Session, was remitted, with instructions to alter this judgment, and decern in the declarator. But the interlocutor of that Court was, upon appeal, reversed by the House of Lords.

1st December 1772.

**MARGARET SCRUTON against JOHN GRAY.**

THE pursuer of this action was the daughter of a writing-master in the city of Glasgow. The defender was the son of an Irish gentleman. Her action was laid upon the allegation of a private marriage between them while he was prosecuting his studies at the University of Glasgow, and upon an arrestment of his effects in the house where he had lodged there, used by her after he had gone home. It was served by edictal citation, and concluded as usual for declarator and aliment.

Defences, by which the jurisdiction was declined, having been repelled, a bill of advocation was presented to the Court of Review, and, after a full discussion in memorials, and by hearing in presence, "The Lords remitted the cause, with instructions to sustain the defences, declining the jurisdiction of the Commissaries."

In the report of the Collector for the Faculty of Advocates, it is stated to have been the opinion of the bench, with respect to the competency of a *forum rei sitæ*, by virtue of the arrestment *jurisdictionis fundandæ causa*, that "the source of that species of jurisdiction, in this and other commercial countries, was utility, and the facilitating the recovery of debts. It is properly a mercantile jurisdiction, not an universal one; and being an exception from the general rule, it is not to be extended to a case not founded in the intention of introducing that sort of jurisdiction; and where the pursuer had a legal remedy, viz. by resorting to the defender's proper *forum* in Ireland. And as to the case of Westcomb, 11th June 1745, cited for her, it was but a single decision, not to be followed as a precedent; more especially, as it is known, that the pursuer in that case derived no benefit therefrom."

8th December 1783.

**General LOCKART WISHART against Mrs. MARIANN MURRAY.**

DIVORCE *a vinculo matrimonii* was obtained by the pursuer against his wife in this case, on proof of adultery committed by her at Bath,

habiting which are parts of the same people and state, occasions must likewise frequently occur, in which any want of this mutual assistance to give due effect to the law cannot fail to be extremely prejudicial.

London, and Brussels, Ostend, Aix la Chapelle, and Ghent. The parties were both of Scotch origin, and, at the date of the action, had a domicile in Scotland, where they had been married.

25th January 1787.

URQUHART *against* FLUCKER.

THE pursuer was a Scotsman, and an officer in the army, who had been married to the defender at Boston, in New England, of which place she was a native. They had cohabited as husband and wife for some time there, and afterwards at Halifax, in Nova Scotia, and in the neighbourhood of London. But having discovered that she had been guilty of adultery at Halifax, in Nova Scotia, and in England, after he had returned to his native country, he raised an action of divorce; and on proof of her guilt, taken by commission in England, decree was pronounced against her, in terms of the libel.

6th February 1788.

ARCHIBALD Earl of EGLINTON *against* Dame FRANCES TWYSDEN  
Countess of EGLINTON.

SENTENCE of divorce was pronounced, without opposition, dissolving the marriage which had been celebrated between these parties in England, on proof of adultery committed in Scotland.

9th February 1789.

Dame ELIZABETH BRUNSDON *against* Sir THOMAS WALLACE DUNLOP,  
Bart.

THESE parties were both natives of Scotland, but had been married at London, and neither of them had any domicile or residence in Scotland at the date of the action. For many years, both had resided in England. The pursuer alleged, that the defender had deserted her society, and resided for sometime in France, where he had been guilty of adultery. He was cited edictally, as amenable *ratione originis* to the jurisdiction of the Commissaries, but made no appearance, until a proof had been allowed to the pursuer of her allegations. A bill of advocacy, complaining of this interlocutor, was then presented by him to the Superior Court, which was refused by the Lord Ordinary. The defender next applied by petition to the whole Court, who adhered to the Lord Ordinary's interlocutor. But upon a second petition, the Lord Ordinary was directed to remit to the Commissaries, with a general instruction "to dismiss the action," which was accordingly obeyed.

11th March 1789.

FRANCES TREVELYAN *against* Major JAMES FIELD.

BOTH parties in this case were English by birth and domicile. They were also married in England. But upon proof of the defender's adultery in Scotland, where he was cited and convened, decree of divorce was pronounced by the Consistorial Court, in absence of the defender, who made no appearance.

7th February 1794.

Duchess of HAMILTON *against* The Duke of HAMILTON.

THE marriage between these parties had been regularly solemnized in England, according to the English law and ritual; and sentence of divorce *a vinculo matrimonii* was nevertheless pronounced, without opposition, upon sufficient proof that the defender had committed the crime of adul-

tery in Scotland, where the parties had their permanent residence during their cohabitation and at the date of the action.

8th March 1796.

MARY PIRIE *against* ANDREW LUNAN.

AT the date of the action in this case, and for many years before, the parties had their only domicile in London, where they permanently resided. But both were natives of Scotland, and had married there, and had cohabited in this kingdom for a considerable length of time previous to their settlement in London. After following the trade of a book-binder, and cohabiting with his wife there for a number of years, Lunan formed a connection with another woman, and pretending that he was a single person, had the ceremony of marriage performed with this woman, in the parish of St Luke, Chelsea, and afterwards cohabited with her. On these grounds, the pursuer sued the defender before the Commissaries of Edinburgh for divorce; and her summons being served edictally against him, as forth of the kingdom, an application was made by petition for a commission to take the pursuer's oath of calumny at her domicile in London; but the Commissaries, upon consideration of the summons and execution, and of this petition (9th June 1794): "In respect that the domicile, both of the pursuer and defender, is situated in London, and that the facts founded on in the libel, as inferring to the defender's guilt of adultery, are stated to have happened there, dismissed the action as incompetent." To this interlocutor they also adhered, on advising two several reclaiming petitions.

A bill of advocacy was presented by the pursuer, and was refused by the Lord Ordinary. (a) A reclaiming petition was also refused by the whole Court. But upon a second reclaiming petition, *ex parte*, the Lord Ordinary was directed by the Court to remit the bill to the Commissaries, with instructions to "sustain the action, and proceed in the cause." Accordingly, the pursuer's oath of calumny, and afterwards a proof, were taken at London, upon two several commissions, and the guilt of the defender being fully established, decree of divorce was pronounced in common form. (b)

13th June 1800.

Lieutenant-Colonel FRENCH *against* HENRIETTA PILCHER.

THE pursuer in this case was a native of Scotland, and resident in this country at the date of the action. The defender was an English-woman, who had eloped with him, and whom he had married at Gretna

(a) Lord Justice Clerk M'Queen.

(b) The published report of this case by the Collector of the Faculty of Advocates is erroneous. There was no allegation of adultery in Scotland. The only information of the reasons which induced the Superior Court to alter the judgment of the Commissaries that has been obtained, is the statement in this published report, that "doubts were entertained by some of the Judges, whether the previous case of Brundson against Sir Thomas Wallace had been rightly decided, and that it was thought that there would be no harm in giving decree to the pursuer, *valeat quantum valere potest*."

It seems proper to observe, that the most eminent talents of the Scottish bar were exerted with much distinction in arguing the case of Brundson against Wallace, which was most deliberately considered by the Court, whereas, in this case of Pirie against Lunan, the defender made no appearance, and the interlocutor of the Commissaries contained the only statement of the objections to the action.

**Green.** Afterwards, they had cohabited together as husband and wife, in Scotland and at the stations of his regiment in England and in India. But the defender having fallen into bad health when abroad, left her husband upon duty in India, and returned to Britain, where she was guilty of adultery, while in Scotland on a visit to his relations, and afterwards at her residence in London.

She was personally served with a copy of the summons at her house in London. But she got no regular citation, and made no appearance.

The Commissaries "dismissed the action, in respect the defender was not cited within Scotland, nor in any shape amenable to the Courts of this country."

In a bill of advocacy, the pursuer pleaded, that Scotland was the place of the contract, and also of his domicil, and, consequently, by construction of law, was his wife's domicil.

"The Lord Ordinary, having advised with the Lords, remitted to the Commissaries, with instructions to sustain their jurisdiction."

In the report for the Faculty of Advocates, it is mentioned, in explanation of this judgment, that it was "observed on the bench—The case of Lunan is decisive of the present, which is even more favourable for the pursuer from his domicil being in Scotland, from which that of his wife cannot be separated. But the defender should have been cited both at market cross, and pier and shore, and at the house of her husband."

27th June 1801.

**ELIZABETH ANN WYCHE and Attorney against CHARLES BURNEL BLOUNT.**

**THE** parties in this case were both English, and married at Gretna Green. Afterwards, they cohabited as husband and wife in England, till the defender deserted the society of the pursuer, and having been guilty of adultery in Scotland, was cited personally in the action, at the quarters of a regiment in which he held a commission at Musselburgh.

The defender made no appearance, and the Commissaries having allowed a proof *before answer*, which was taken by commission in England, and afterwards (20th February 1801), "Having considered and compared the libel with the proof, found it not proved, either that the marriage of the pursuer or the defender, who are not Scotch but English by birth, was celebrated in Scotland, or that they cohabited in Scotland as husband and wife any time after their marriage, or that the defender has had any sufficient or settled residence in Scotland, or even that the crime on which the divorce is founded was committed in Scotland; therefore found, that the action is not competent in Scotland, and ought not to have been brought before this Court; and dismissed the process for want of jurisdiction."

But this judgment being submitted to review of the Superior Court, the Lord Ordinary (Meadowbank), after reporting a bill of advocacy, "remitted to the Commissaries, with instructions to sustain their jurisdiction in this case, in respect the summons was executed against the defender when resident in Scotland, and possessing a domicil there: Find it competent to refer to the oath of the defender, the authenticity of his subscription at the certificate of marriage produced, and that said certificate is genuine; admit the said reference, and grant commission accordingly."

A reference was accordingly made to the defender's oath; and, in

obedience to the direction of the Superior Court, the Commissaries having ordained him to depone, he disobeyed, and was held as confessed, and decree was pronounced against him, in terms of the libel. (a)

27th June 1801.

MARIA MORCOMB *against* JOHN LAW MACCLELLAND.

THE defender, in this case, was a Scotch surgeon, who had entered into the service of the navy, and while stationed in a receiving ship at Plymouth, had there married the pursuer, who was an Englishwoman. She alleged, that after many years cohabitation there, he had deserted her society, and been guilty of adultery. The citation was edictal; but a certificate by a notary was produced, that a copy of the summons had been delivered to the defender personally at Plymouth. He appeared, and declined the jurisdiction of the Commissaries, and their judgment was in these terms: "Considering that the courts of one country ought not to be converted into engines, for either eluding the laws of another, or determining matters foreign to that territory, and that decrees of divorce, pronounced by incompetent courts, cannot effectually and securely either loose the bonds, or dissolve the marriages, or fix the *status* of the parties thereto, but might become causes or snares to involve other persons, as well as the parties and their children, in deep distress; and observing it to be admitted in the libel, that the marriage of the pursuer and defender was celebrated in England; that they resided constantly in England since their marriage, and even that the crime on which divorce is here demanded to be decreed was committed in England; therefore find, that the action is not competent in Scotland, and ought not to have been brought before this Court; and dismiss the process in all its parts, for want of jurisdiction and of power."

Lord Armadale, the ordinary, refused a bill of advocation, and the pursuer, in reclaiming petition, pleaded, that in a question like the present, the defender would be amenable to the Courts of Scotland, even *ratione originis*; but in truth, having been constantly in the navy service ever since he left Scotland, he has acquired no other *forum*, and, consequently, the country in which he was born and educated is still his proper domicil; according to the decisions in the cases of (11th June 1745) Dodds against Westcomb; 8th March 1796, Pirie against Lunan; 13th June 1800, French against Pilcher.

The Lords unanimously refused the petition without answers.

8th March 1805.

MURRAY *against* LINDLEY.

THE parties in this case were English, and were married in Ireland. The defender came to Scotland as an officer of an English regiment of militia, and was personally cited there in an action of divorce for adultery. He entered appearance, and denied the relevancy of the libel. After his defences had been repelled, he objected to the jurisdiction, by the form of petition, against the interlocutor. The Commissaries found, that the jurisdiction had been prorogated. A bill of advocation was refused by the Lord Ordinary, (Cullen) and his Lordship's interlocutor was adhered to by the whole Court of Session, upon considering a petition with answers.

(a) The defender in this case had no other domicil in Scotland but the station at which he resided while on military duty.

27th January 1807.

**LINDSAY against TOVEY.**

THE pursuer, in this case, was a Scotchman by birth, and heir of entail of an estate in Scotland. He entered into the army, and married, when with his regiment at Gibraltar in 1781, Miss Tovey, the daughter of an English officer, with whom he afterwards cohabited there as his wife, till some time in the year 1784. From that period till the end of the year 1792, their permanent residence was in Scotland. They then removed to Durham, where his family remained, and where he lived with them, when not employed on military duty, till December 1802, when the parties entered into a voluntary contract of separation. Afterwards the pursuer resided in Scotland, when not from home on duty.

In December 1804, the pursuer commenced an action in the Consistorial Court of Scotland, the summons of which concluded, in the usual style, for divorce *a vinculo matrimonii*, upon allegations of criminality, both before and after the separation, the date of which was specified.

A preliminary defence was stated, declining the jurisdiction, on which an interlocutor was pronounced (5th April 1805), finding, "that the Commissaries of Edinburgh have a proper jurisdiction in the present instance."

The defender presented a bill of advocation, complaining of this interlocutor, which was refused by Lord Bannatyne, Ordinary (22d May 1806), and, upon a petition to the whole Court of Review (27th January 1807), his Lordship's interlocutor was adhered to.

An appeal was taken against these interlocutors to the House of Lords, and the judgment pronounced was in these terms: "Ordered and adjudged, that the cause be remitted back to the Court of Session, to review their interlocutors complained of, and to do therein what to the Court shall seem just; and it is further ordered, that the Court do give all necessary directions, as well in the said Court as to the Commissaries of Edinburgh, for enabling the said Court effectually to carry into execution the judgment of the said Court, which shall be pronounced after such review." (a)

12th October 1810.

**Lady PAGET and her Attorney against Lord PAGET.**

THE action in this case concluded, in the usual form, for dissolution of a marriage celebrated in England, on the ground of adultery committed both in that country and in Scotland. It was served personally upon the defender, at the House of Lude, in the county of Perth, where the defender had been previously living as tenant of the proprietor for several months. No appearance was made for the defender, when the cause came to be moved in Court, and upon a regular application by petition, showing reason, a commission was granted by the

(a) The above abstract of this case is intended merely as a reference to the report of the decision of the Court of Session, published by the Collectors for the Faculty of Advocates, and to that of the judgment of remit in the House of Lords by Mr. Dow. It is, however, sufficient to show, that the preliminary point of jurisdiction only was submitted to the consideration of the Radical Court in Scotland, and by a very imperfect statement of the circumstances from which the question arose.

Judge officiating in ordinary, according to previous practice, for taking the defendant's oath of calumny in England. Afterwards defences were lodged, which contained a mere denial of the libel. The pursuer was then ordained "to give in a special condescendence of the facts she averred, and would undertake to prove, in support of the conclusions of her libel, and therein to state the persons with whom, the places where, and the dates on which the alleged acts of adultery had been committed."

In compliance with this order, she entered into a minute detail of the defender's desertion and guilt. He lodged answers, in which he said, that he "rested his defence on the pursuer's inability to prove her averments." But in which he also pleaded, that no proof should be allowed of the facts alleged, which were previous in date to a reconciliation which had taken place between the parties in the year 1809, and after his original desertion of the pursuer.

The interlocutor upon these pleadings (21st September 1810) allowed a proof of the marriage between the parties, and of the alleged adultery of the defender in Scotland to the pursuer, and a conjunct probation to the defender. In this proof he joined issue, as seriously maintaining his defence. But his guilt being clearly established, decree was pronounced in common form.

10th January 1811.

MARGARET WILCOX *against* RICHARD PARRY, Esq.

By the proof in this case it was established that the parties were English, and having eloped from their families, were married irregularly at Annan, in the county of Dumfries, and that, after they had cohabited sometime as husband and wife in the neighbourhood of London, the defender had deserted her society, and been guilty of adultery in Scotland. He made no appearance, and decree of divorce was pronounced in absence.

7th June 1811.

ELIZABETH ALDOWS *against* HENRY ALDEN.

DECREE of divorce *a vinculo* was given against the defender in absence, upon proof that he was living in Scotland at the date of citation, and had, for some time before, resided here, and had committed adultery in this kingdom, although the parties had been married, and had cohabited in England, and had their real domicil in England, of which country both were natives and subjects.

28th June 1811.

Mrs. MARY RODGERS *against* C. B. WYATT, Esq.

THE parties were married in England, and had cohabited together only in that country, of which they were natives. But the pursuer alleged, that he had deserted her society, and been guilty of adultery, both in England and Scotland. He was personally cited, and having made appearance, stated in defence, "that the allegations set forth by the pursuer must be proved. He has no objection to such proof being allowed, at the same time he reserves to himself the privilege of vindication, upon the proof being reported, if so advised; and further craves to be allowed a conjunct probation."

Two successive petitions, for a commission to take the pursuer's oath of calumny in London, were refused, and she appeared in Court, and deposed that there was no collusion. Afterwards a proof was taken,

which fully established the defender's guilt, and decree was pronounced in terms of the libel.

25th October 1811.

UTTERTON *against* TEWSE.(a)

10th January 1812.

Lady HILLARY *against* Sir WILLIAM HILLARY.

THIS case was similar to that of Tewsh, and, after going through the same course of procedure, was decided according to the instructions of Lord Meadowbank, Ordinary, by interlocutor of remit from the Superior Court, upon a bill of advocation, accompanied by a note of his Lordship, in the same terms as in the case of Tewsh.

10th January 1812.

Mrs. FRANCIS HEWET and Attorney *against* JAMES WEBBER, Esq.

THE circumstances of this case also were similar to those of the two preceding cases of Tewsh and Hillary, except that the defender made no appearance. The procedure in it was, however, sisted by the Commissaries, when the bills of advocation in these were presented, till the judgment of the Superior Court upon the general question should be obtained. Afterwards, in conformity to that decision, the proof of the defender's guilt being complete, decree was pronounced in terms of the libel.

6th March 1812.

JOHN WHITE, Esq. *against* ESTHER HESTER.

DECREE of divorce *a vinculo* of an English marriage between these parties was pronounced, upon proof that the defender was living as a common prostitute at Edinburgh, in conformity to the decisions of the Superior Court, in the preceding cases of Tewsh and Hillary, although she had appeared, and pleaded, that the *lex loci contractus* ought to govern, and that her husband was an English gentleman, who had no domicile in Scotland.

20th March 1812.

ANN SUGDEN *against* WILLIAM MARTIN LOLLY.

THE summons in this case alleged, "that, in the year 1800, or thereby, the pursuer was married at Liverpool to the said William Martin Lolly, and, in consequence of their marriage, they afterwards cohabited together as husband and wife," &c. but alleged, "that the said William Martin Lolly, defender, having some time ago had occasion to come to Edinburgh, the pursuer accompanied him thither, and since their arrival they have lodged in Mackay's inn, Grassmarket, Edinburgh: That since the said William Lolly, defender, came to Edinburgh, he has also at different times and places given himself up to adulterous practices," of which a detail followed. She also accused him of previous adulteries in England; and, upon these charges of adultery, she concluded for divorce in the usual form.

Defences were lodged, which bore, "that, referring to the libel as laid, the defender denies the same, except in so far as it states that the pursuer and defender were married together at Liverpool, and cohabited

(a) See the first Report of this volume. To give a connected view of the whole course of decisions, an abstract of those which followed is likewise added here.

there as husband and wife, as they also did since they came to Scotland, till the pursuer thought proper to become jealous of the defender, and to bring the present action against him on the head of adultery. As to the acts of infidelity alleged to have been committed by the defender in England, while the defender denies these, he has to observe, that he does not conceive that these are relevant in the present action, although they were true. All that the Court is competent to judge, is the defender's alleged infidelity to the pursuer since they came to Scotland, stated in the libel. With regard to the marriage between the parties, that the pursuer may easily prove, but he does not believe she will be able to prove the alleged infidelity of the defender towards her, said to have been committed by him in Edinburgh; but should the Commissaries allow her a proof thereof, the defender craves they will allow him a conjunct probation of all facts and circumstances tending to exculpate him."

The Commissaries admitted the pursuer to her oath of calumny, and she deponed, "that she has good cause to pursue the present action of divorce against her husband, William Martin Lolly, because she believes that he has been guilty of the crime of adultery, and that the facts stated in the libel (which has been read over by the deponent) are true. Depones, That she came to this country along with her husband, about the 23d of November last. Interrogated, Whether she knows what was the intention of the defender in coming to this country, and why did she, the deponent, accompany him? depones, That when they set off together, she did not know of his intention of going further than Carlisle, in Cumberland, at which place the defender first intimated to the pursuer his intention of going to Edinburgh, and said to her, that as Edinburgh was a fine place, he would take her along with him to see it. Depones, That for a good while the defender said, that he would leave the pursuer at Carlisle, but at last he proposed bringing her along with him to Edinburgh, and asked if she would like to accompany him: That she signified her willingness to do so, and they came accordingly. Depones, That for these three years past, the defender has behaved extremely ill to the pursuer, and would not allow her to see her children, and that she came to this country along with him in hopes that a reconciliation would take place, and that she would then be permitted to see her children. Depones, That previous to raising the present action against her husband, she has had no communication with him with reference to it, nor did she ever intimate to him her intention of bringing it; and that at no time, or in any way whatsoever, either personally, or through the medium of friends or agents, did she ever give her husband to understand that she was to institute the present action, and the deponent positively swears, that there is no collusion between her and the defender in carrying on the present action."

Afterwards, as they had done in the preceding English cases, the Commissaries (31st January 1812), "In respect that the parties in this action appear to be English, and the marriage between them to have been likewise an English contract, before farther procedure, appointed the pursuer to state, in a condescendence, the grounds, both in fact and in law, on which this Court is competent to entertain her action."

In this condescendence the pursuer founded "upon the decision of the Supreme Court in the case of Utterton against Tewsh, 12th October 1811;" and although in answers the defender retracted his prorogation

of the cause, as arising from ignorance of the law, and entered into a long argument, in support of which he cited a variety of cases, as, in his apprehension, tending to show that a different decision should have been pronounced, the Commissaries, by a majority, conceived themselves to be obliged, in obedience to the authority of the Superior Court, to allow by their interlocutor (21st February 1812) in this case also, "before answer," a proof of the "facts stated in the libel and condescendence, and to the defender a conjunct probation."

The evidence completely proved the facts alleged with respect to the guilt of the defender during the residence of the parties together in this city; but with such circumstances of undisguised profligacy in the conduct of the defender, as led the Court to suspect that there might have been connivance on the part of the pursuer.

Under the impression, therefore, that it was still their duty to detect and resist all collusive attempts of English and Irish parties to dissolve their marriages celebrated under the law of England, by employing the Scottish consistorial jurisdiction as the instrument, the Commissaries, by special interlocutor (12th March 1812), "In respect of circumstances in this case, which had attracted the notice of the Court, appointed the defender, now in this country, to attend for judicial examination next Court day, and this interlocutor to be immediately intimated." Accordingly, on the day following (13th March), the defender was judicially examined, and declared, "that neither before he came to Scotland with his wife, the pursuer, nor since, had he any conversation whatever or communication of any sort with her relative to the institution of this action, nor has there been any understanding or agreement between them of any kind or proposal respecting this process; but since it commenced, he did offer to his wife to place in her disposal a sum of money if she would drop it, which she refused, and gave him to understand, that no sum whatever would induce her to abandon it. Declares, That his wife and he have not cohabited together, either at bed or board, since she made the accusation against him which is the subject of this process; and that nothing could be further from his intention than to give her an opportunity of divorcing him."

The pursuer also was judicially examined, and declared, "That she is certain, from every circumstance, that nothing could be further from her husband's intention than that she should become acquainted with his guilt, and that she has neither derived her information from him, nor from any person employed by him to inform her, or with his knowledge or permission; and that the defender has endeavoured to persuade her to give up this action since it was raised, and has offered her terms to do so, which she has absolutely refused."

The suspicion of collusion not being established by these declarations, and no further means of investigation remaining in this cause, decree was given in the usual form.

26th March 1813.

Colonel JOHN M'DONALD *against* HENRIETTA JUSTINA FRITZ.

THESE parties were married at Ceylon, and cohabited together in that island, and at Bombay as husband and wife, till the pursuer was obliged to return to Scotland, of which country he was a native, on account of health. He left the defender at the house of her father, the Dutch Governor of Point de Galle. During his absence she became un-

faithful, and having cited her edictally in an action of divorce, he established the facts by the evidence of Scotch officers who happened to return home from that place, and obtained decree, without opposition from the defender, who made no appearance.

9th April 1813.

CATHARINE POLLOCK *against* RUSSELL MANNERS, Esq.

THE action in this case was laid upon the alleged facts, that the defender had entirely deserted the society of his wife for upwards of ten years, leaving her unprovided with suitable means of subsistence. That "after leaving his own home, he also left England," (of which country they were natives, and in which they had been married, and had lived during the period of their cohabitation), and having resided sometime in North America, he "had now taken up his residence in the city of Edinburgh;" where, it was farther stated, that he had remained for near a twelvemonth before the date of his citation, and had been guilty of various acts of adultery.

After examining the pursuer fully under the oath of calumny, as to collusion, for suspicion of which no ground whatever appeared, and taking a proof, which fully established the truth of the pursuer's allegations, the general question, whether the law of the contract or of the domicil, holding that of the defender to be in Scotland at the date of the action, should govern the decision, was fully discussed at great length, both by the form of memorials, and of hearing counsel *viva voce* at the bar. During this discussion, the defender entered appearance, but afterwards withdrew; and the subsequent pleadings on his side were presented by one of the solicitors for the poor, as prepared by counsel, under the direction of the Court. At the close, decree was pronounced, in terms of the libel.

30th September 1814.

Mrs. MARIANNE HOMFRAY and Attorney *against* THOMAS NEWTE, Esq.

THE parties were natives of Wales, and were married, and had afterwards lived there during their cohabitation as husband and wife. In obedience to an order of the Court, the pursuer specially alleged as to the defender's domicil, "that Mr. Newte was a man of fortune. He had land estates in England, and was also possessed of a considerable personal estate in that country. He had also a considerable property in Scotland. He had 10,000*l.* laid out on one heritable bond over the estate of Harris, belonging to Mr. Macleod of Harris. He married the pursuer in England six years ago. The parties lived on good terms for some time, afterwards they differed and separated. Mr. Newte gave up his house and family more than two years ago, and went about from place to place, as it suited his fancy, without any settled residence. In the month of July 1812, he came to live in Scotland. In August he made an occasional visit to a friend in Perthshire, and afterwards went to other places in the country. No circumstances then occurring to indicate his intention, whether to remain in the country or to leave it. In the end of August or beginning of September, he fixed his residence in Edinburgh. At first he lodged for a few days in a hotel; afterwards, about the middle of September, he went to Cunninghame's lodgings, in George Street, where he remained about four months, and then went to Cooper's lodgings, in St. Andrew's Street, where he had remained ever

since. In October he resolved to lend his money on the heritable security, which was afterwards completed in January. In January he was suddenly called to London, in order to make an important transaction as one of the executors of a deceased relation. He staid there a few days, and returned to Edinburgh immediately after the transaction was completed, thereby indicating, in the strongest manner, his intention to reside in this city, where he still resided in Cooper's lodgings, without any apparent intention to change. He had houses on his different English estates, and had it in his power to reside in them, but he had no establishment anywhere but in Edinburgh. The pursuer resided at Cheltenham, and had done so for a considerable time past, having no house or home belonging to her husband where she could reside. Under these circumstances, it seemed to be perfectly clear, that Mr. Newte was domiciled in Scotland to all intents and purposes." By his answers the defender acknowledged, "That the facts stated in the minute for the pursuer were true, and thereby admitted on the part of the defender, but," (he added, that) "the inference deduced therefrom was denied in point of law."

After considering memorials for the parties, and also hearing their counsel at the bar, a majority of the Court, in the circumstances of this case, were of opinion, that the action must be sustained. An inquiry was attempted as to collusion, which failed. (a) The pursuer also condescended specially as to the fact of the defender's having been guilty of adultery in Scotland, and, on full proof of her allegations, sentence of divorce *a vinculo* was given.

16th December 1814.

JANE ARUNDEL ST. AUBYN *against* Captain CHARLES O'BRIEN.

THE pursuer in this case was an English lady, and the defender an Irishman, and an officer in the army. They were married in England, and lived there while they cohabited together as husband and wife. But the defender had resided in Scotland for some months before the date of the action, and was accused of having committed adultery in this kingdom.

He made no appearance; but in the course of the pursuer's proof, Isabella Milligan, a witness examined by her to prove the defender's guilt, spontaneously stated upon oath, that the defender had communicated to this witness the particulars of a collusive arrangement between him and the pursuer, which had been carried into effect by him, with the assistance of her agent in this city, Mr. Donald M'Lean, writer to the signet.

To ascertain the truth or falsehood of this statement, the Commissaries, after taking Mr. M'Lean's judicial declaration, appointed that gentleman to depone. But the Superior Court, upon a bill of advocation, remitted to alter this interlocutor. (b)

The proof of the defender's guilt was complete, and decree was given, in terms of the libel.

25th August 1815.

Mrs. MARY GORDON *against* Lieutenant-Colonel ALLEN HAMPDEN  
PYE.

THE parties in this case were natives of England, and were married in England in the year 1797, where they also resided together during

(a) See following Note (B.)

(b) See Note (B.)

the whole period of their cohabitation. But the defender had for three years preceding the date of the action deserted the society of his wife, and after being guilty of adultery in England, had, according to her allegation, "transferred his domicil to this country," and had likewise been guilty of adultery in Scotland.

The defender made no appearance. But the Court considered the case very deliberately, without the assistance of any pleading for the defender, and a majority of the Judges concurred in pronouncing this judgment (3d January 1814): "The Commissaries, having considered the whole process in respect, that it appears from the pursuer's libel and condescendence, that the parties are English, and the marriage between them was celebrated in England, and that the permanent domicil and residence of both as husband and wife, is, and has always been, in that kingdom; in respect also, that the temporary residence of the defender and alleged commission of adultery by him in Scotland, can have no effect to alter the condition of the contract between the parties, as indissoluble *secundum legem loci contractus*, and to authorize this Court to pronounce sentence of divorce *a vinculo matrimonii*; and, in respect no other remedy which this Court might have competent jurisdiction to apply in the circumstances of this particular case, has been sought by the pursuer, find the present action as now maintained incompetent; dismiss the cause, assoilzie the defender from the conclusions thereof, and decern."

The reasons of this judgment appear from the following notes of the opinions of a majority of the Court, which the parties obtained for their own use by request of their counsel, made *in foro*, when the interlocutor was pronounced, and which were afterwards printed by order of the Superior Tribunal.

*Opinion of Mr. Commissary Gordon.*

"Differing as I have always done, from the rule of decision that has been generally adopted in these English divorces from 1801 till now, and not being convinced by the unquestionably able reasoning of the very learned Judge of the Court of Session, who [October 12, 1811] remitted the cases of Hillary and of Tewsh, with instructions to this Court to proceed according to the dictates of the law of Scotland, I am pleased that this point is again brought under discussion, as it has been well said, by that great law authority, to be one "near the very sources of general jurisprudence, and reaching to consequences of incalculable number and magnitude."

"But considering that his Lordship had no doubt on the point, and that several of my brethren in this Court, and, as I believe, the weight of the bar in this country, formerly agreed with him, I should have hesitated to submit again at any length the view which I have always taken of these cases during the eight years and a half that I have sat here, if I had not known that my opinion was confirmed by the infinitely higher authority of those of the twelve Judges of England, and also by the opinion of the Lord Chancellor (so far as I am able to discover his Lordship's sentiments from his speech on the late appeal case of Tovey against Lindsay), and by that of Lord Redesdale.

"The alleged facts in this case appear to be these. The pursuer, Mrs. Mary Margaret Gordon, of the county of Somerset, in England, was married to the defender, Lieutenant-Colonel Pye (I presume of that

county, for it is nowhere stated), in the church of Bathwick, on the 15th of February 1797, and they cohabited for some time as husband and wife (it is not said where, or how long); but the defender had withdrawn himself from his said wife, and is now living in adultery at Edinburgh with one Jane Collins, and other women mentioned in the libel. It is also stated that the defender had resided 40 days in Scotland, and was personally cited in this action.

“That similar facts, if proved, would be sufficient in a case betwixt Scotch parties, married in Scotland, to obtain a divorce *a vinculo matrimonii*, according to the conclusions of the libel, no one in the least acquainted with the law of Scotland, or the uniform practice of this Court since the year 1563, can doubt; but whether they are sufficient in a case betwixt foreigners married in a kingdom where the marriage contract is known to be indissoluble, is a matter of more uncertainty.

“On a point of such difficulty we must regret that the defender, Lieutenant Colonel Pye, having made no appearance in the suit, there are pleadings only on the side of the pursuer. The Court is thus laid under the necessity of seeking for the arguments on his side in former cases, and by its own unaided research. Indeed, I may observe, that in all the cases of English marriages which have come before this Court, or the Court of Session (the cases of Sir Thomas Wallace and Major Eccles Lindsay only excepted), it is quite evident that one and all of the defenders have shown no serious disinclination to be divorced, and would even seem privately to have connived with the pursuers. Hence, too, the reason why the Lord Ordinary was not informed of the opinions of this Court in the discussion of the advocations of Hillary and Tewsh.

“The forms observed in the celebration of marriage, and the laws which prescribe what is essential to this contract, have been very different in different ages and in different states. Of the law of divorce in the earliest ages of Christianity we are but very imperfectly informed even by holy writ. St. Jerome and Josephus tell us that it was accomplished by the husband giving the wife a writing to this effect,—“I promise that I will hereafter lay no claim to thee.”(a) I am not inclined, however, to enter into the controversy whether, from the Gospels, it is clear that a husband could, by putting away his wife in this manner, dissolve the *vinculum matrimonii* without even the intervention of a Court,—or whether, by the most ancient law of the Christian church, as explained by St. Matthew, St. Mark, and St. Paul, the husband could only have a divorce *a mensa et thoro*.

“Whatever the law as to the indissolubility of marriage was in those early times, a reference to the *Institutiones Juris Canonici* shows that it had become an established rule in this code, that a marriage lawfully contracted was indissoluble by any power whatever, according to this plain and unequivocal declaration—“*Sciendum est igitur legitime contractum matrimonium dissolvi non posse, quippe a Deo conjuncti ab homine separari non debere nec valeat.*”(b)

“Actions of divorce were, no doubt, common in Ecclesiastical courts; but these only took place where the marriage was to be declared void *ab initio* for some legal impediment, or *a mensa et thoro* for adultery or maltreatment. This, too, clearly still remains the established

(a) Deuteronomy. St. Matthew. St. Mark. (b) Instit. Jur. Canon. lib. ii, tit. 16.

law of all Roman Catholic countries in Europe (excepting France since the late revolution), as well as of England.

“It appears to me, however, only necessary, for the decision of the case now before us, to ascertain,—*First*, What is the law of England. *Secondly*, What is the law of Scotland as to divorce. And, *Thirdly*, What is the rule of international law as applicable to this suit.

“Notwithstanding the most anxious research on my part into every authority I had access to, I have not been able to satisfy myself upon what grounds the rule of the English law as to the indissolubility of marriage was first adopted. But I see it distinctly laid down by Lyttleton, (a) the great English institutional authority, that “there be two kinds of divorces,—the one that dissolves the marriage *a vinculo matrimonii*, as for consanguinity, &c.—and the other, *a mensa et thoro*, as for adultery; because that divorce, by reason of adultery, cannot dissolve the marriage *a vinculo matrimonii*, for that the offence is after the just and lawful marriage.” And the case of Foljambe, decided in Queen Elizabeth’s time, has been ever since held as a conclusive precedent on this point in England.

“I have been equally unable to discover from what origin (unless it be from some rule in the code of the Jews, or in the *Novellæ* of the *Corpus Juris Civilis*) the dissolubility of marriage, for adultery or non-adherence, by our law is taken. We have the authority of Craig for holding the canon law to be the basis of our consistorial law; and the decretals previous to the Reformation have always been considered as a part of the law of Scotland. But as there is no decretal respecting divorces in the canon law of Scotland of 1242, as collected by Lord Hailes, I am inclined to think divorces were not then in practice in Scotland. It would also appear from the *Regiam Majestatem* and *Quon. Attachiamenta* (which contain the earliest authorities of our law that are recognised in subsequent statutes), that divorces *a vinculo* were not at that time in practice. For they are thus mentioned in the *Reg. Maj.* (b) “It is towit, that gif the wife be separate fra the husband in his lifetime for filthiness of ane crime of her body, she may naway ask or claim ane dowrie after her husband’s deceis. The like is to be said gif she separate for parentage and sibness of blude (within degrees defended and forbidden). The wife forsalts her dowrie gif she is divorced and separate by sentence of the ecclesiastical judge fra her husband by reason of adultery committed by her.”

“And in the *Quon. Attach.* which appears to refer to the statute 2d Robert I. cap. 13, and was written in King David Bruce’s time, it is laid down, (c) “Gif any wife flees away willingly fra her married husband to another man, for lecherie or sensuality of her body, &c. that wife shall not recover ane terce after her husband’s deceis, except her husband *receive her home again of his own free will, without compulsion of holy kirk.*”

“It would likewise appear from Sir George M’Kenzie’s *Institutes*, vol. ii. b. 1. t. 6. sect. last, that when divorces *a vinculo* were first granted, the innocent parties alone were allowed to marry again.

“I have, however, satisfied myself that all the text writers of au-

(a) Burn’s *Eccl. Law*, p. 500. Lyttleton, 1 *Inst.* 32, 33, 235. 3 *Inst.* 88.

(b) B. ii. c. 16. sect. 73.

(c) *Quon. Attach.* c. 35.

thority on English law consider the marriage-contract as indissoluble, and that it can only be set aside by an act of Parliament, which could equally well dissolve any Scotch marriage, if the parties preferred that mode of redress rather than to apply to our Court. Upon the other hand, it seems to be equally clear, from (a) Stair, Erskine, and all our other institutional writers (M'Kenzie excepted), and from the Scotch acts of Parliament, 1551, ch. 19; 1563, ch. 74; 1573, ch. 55; 1592, ch. 117, and 1600, ch. 20, as well as from the uniform decisions of our tribunals, that whatever the old law may have been here, a Scotch marriage is now dissoluble by this Court, and has been so ever since the date of the first of those acts of the Scotch Parliament, and upon the ground either of adultery or of non-adherence. The parties, too, may here lawfully marry again with any other person not within the prohibited degrees of propinquity, the paramour excepted. It is, however, quite a different question; and certainly much more doubtful, how far the *jus gentium* will authorize the courts of one kingdom to entertain actions professedly instituted for setting aside contracts, which the parties *admit* cannot be set aside in the country where these were entered into; and although they must have been aware of this condition, because the very ceremony of marriage declares it to be indissoluble; and every one is held to know the law of his country.

"This question, I humbly conceive, has never been properly and fully brought under the consideration of this Court, or of the Court of Session, in a case seriously litigated by the parties, since that of *Brunsdone* against *Wallace* was decided. But the decision there pronounced seems to me to have been adverse to the principle on which this Court and the Court of Session (by the remits in *Hillary* and *Tewsh*) have decided the late cases.

"The points which appear to come more immediately under our consideration in the present shape of this particular action are two. *First*, Whether the defender has acquired such a domicil as to give jurisdiction to this Court in a question of *status*. And, *secondly*, Whether the case ought to be decided according to the *lex domicilii* alone, or if the *lex loci contractus* ought to be taken into consideration.

"As to the *first* point, it is clear that this is not the *forum* of the defender, either *ratione originis*, or *ratione contractus*, or *ratione rei sitæ*; and that the suit is instituted and founded on the remaining ground of the *lex domicilii*, from an occasional or temporary residence of the defender for 40 days in this country, while, in reality, his permanent domicil continues to be in England; where, I presume, he may very probably be actually dwelling at this moment. It appears to me, therefore, that an action raised on such a residence is in some measure *in fraudem legis*; and that this Court ought to hesitate before we sanction such a residence as being sufficient to found a jurisdiction for trying the most important questions of *status*.

"On looking into Voet (b) as to the *forum domicilii*, I observe he says, "Domicilio quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larum rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet undeque cum profectus est

(a) Stair, b. i. tit. 4, § 7. Ersk. b. i. lib. 6, § 43, 44. M'Kenzie, Vol. II. b. i. T. 6. § last.

(b) Voet ad Pand. lib. v. tit. 1. sect. 92.

*perigrinari videtur.*" From this definition it is obvious that a man's legal domicile is not always to be determined by the place where he may be actually dwelling, but depends upon the place in which his strongest connections have been formed, where the seat of his fortunes and prospects is permanently fixed, and which he only leaves when necessity, or accident, or business, requires him to travel into other countries. We, indeed, all know that, besides this permanent domicile, a man may have many domicils of action at the same time. It is, however, a matter of great doubt whether such a domicile as is admitted to found jurisdiction in actions of debt, ought to be allowed to do so likewise in the more important questions of *status*. But, as my opinion for dismissing this action is founded principally on the second point, I shall not dwell longer on this.

"The *lex loci contractus*, as it appears to me, is the only sound and safe rule for courts to adopt in deciding *questiones status*; and if it has not been adopted, I do, with great submission, think it ought to be so among all civilized states. Indeed, if any other rule were to be universally followed *inter gentes*, I humbly conceive that the law of marriage in particular, on which the happiness of society so mainly depends, must become completely loose and unsettled. Thus, for example, we know that in France incompatibility of temper has been made a ground of divorce *a vinculo matrimonii*. In Connecticut and Rhode Island, by the law of these states of civilized North America, six weeks absence is a sufficient ground of such divorce. Instances, too, are not unfrequent of husbands going from the neighbouring state of New York into one or other of these, and, after a residence of six weeks, intimating to their wives, by public advertisement, that they require their presence and society; and, on the non-appearance of the wife obtaining a divorce, and returning to New York loosed of their matrimonial bonds.

"If the courts of one country were therefore to adopt the *lex domicilii* as the universal rule of decision upon questions affecting *status*, without taking into view the *lex loci contractus*, and if the courts of another country, in which the contract was entered into, were to respect such decisions, marriage, in particular, would then only be binding so long as it was agreeable to the parties, without any respect to the interests of children or of society. A Scotch husband, who was dissatisfied with his wife, and wished to marry another, would have only to sail to Rhode Island, and, after two months residence there, might return with a decree of divorce in his pocket, ready to enter into matrimony of new. Or, supposing the courts here were not to respect such a divorce, he might remain where he was divorced, and marry again there. Thus, the greatest embarrassment would ensue; for the parties might be married in one country, and unmarried in another; and the rights of third parties would be involved in inextricable confusion, to their unspeakable distress, since it cannot be disputed that all the patrimonial consequences of marriage, as to terce or dower, and succession of children, must be regulated either by the *lex loci contractus* or *rei sitæ*, and not by the *lex domicilii*. But to posterity and to the relations of society and morals of the state, it is obvious that effects far more injurious would follow from such a situation than from all the cases of unchecked profligacy so glowingly depicted by the pursuer. Indeed, this impunity may at once be put a stop to in Scotland, by resorting to our

criminal law against notour adultery, (1563, c. 74. 1581, c. 105.) which even authorises the infliction of capital punishment.

“The pursuer has founded on the case of *Hog v. Tenant* as a decision in favour of the *lex domicilii*; but that case refers entirely to pecuniary and patrimonial interests; and it appears to me that there is a marked distinction between those conditions of the marriage-contract, which relate to the policy and institutions of the state, and those which only relate to the arrangements betwixt the parties themselves, as to pecuniary matters, during the subsistence of the marriage, or at its termination. The former ought not at any time to be alterable; the latter may be arranged and modified at their pleasure. Besides, in the case of *Hog*, I may here notice, that the Lord Ordinary found, “When parties marry in one country, and afterwards remove to another, in which the legal rights of married persons are different, the change of domicile ought not to operate any change on any of the rights pre-established in the country where they married, unless incompatible with the religion and morality of the country.” But it is proper to state, that the court had no occasion afterwards to consider this point, or to decide upon it. Thus, although this interlocutor remained unaltered, it only shows the opinion of the Lord Ordinary.

“I shall now refer to authorities<sup>(a)</sup> which appear to me to adopt the *lex loci contractus* as the rule of decision in such questions as the present. In particular, I think, with deference, that Huberus, Hertius, Emerigon, and Ranchin, do all concur in that principle. As to the constitution of the contract, it is, however, certainly allowed by all authorities, that it must be decided by the law of the country where it is entered into. Thus, Sir William Scott, the high authority of whose opinion will not be disputed in any part of the world, where international law is known, in deciding the case of *Dalrymple*, as to the validity of a Scots marriage, says,<sup>(b)</sup> “Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon’s marriage rights must be tried by a reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.”

“Now, it must be admitted, that the Scotch law of marriage is as adverse to the English law of marriage, as the English law against admitting divorces for adultery is to the Scotch law of divorce.

“It appears, too, that the rule followed here by Sir William Scott has been invariably adopted by all other authorities of the English law, in every case of contract entered into in a foreign country, and in all cases of prize. In the case of *Feaubert v. Turst*, *Precedents in Chancery*, No. 207, an agreement made at Paris was decreed in Chancery to be valid, as executed according to the French law. In the case of *Jermino v. Burrows*, 2 *Strange’s Rep.* 733, as to bills of exchange, the Lord Chancellor was clearly of opinion for deciding according to the peculiar law of the place where the bill was negotiated. In the case of *Holman*

(a) Hub. de Conflictu, sect. 2 and 9. Hertius, p. 180, sect. 10. Emerigon, p. 122. Ranchin, p. 162.

(b) Dobson’s Report, p. 6.

*v. Johnston, Cooper*, No. 341, Lord Mansfield said, ‘There can be no doubt but that every action tried here must be tried by the law of England; but the law of England says, that, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of the foreign countries where they arise.’ And his Lordship referred to the Treatise of *Huberus de Conflictu Legum*, vol. ii. p. 339. The same opinion was given by his Lordship, 1 Blackstone’s Rep. p. 256, in the case of *Robinson v. Bland*, where he says, “The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and *not where the action is brought*, is to be considered in expounding and enforcing the contract; but this rule admits of an exception where the parties, *at the time* of making the contract, had a view to a different kingdom.” I may here observe, that this exception very properly applies to English persons coming down and marrying in Scotland, with a view to return there, and *vice versa* to Scotch parties marrying in England, with a view to live constantly in Scotland. And were this an action in which the parties were truly Scotch, and only married in England, I am at present inclined to think we might, upon the exception, proceed to divorce *a vinculo matrimonii* such Scotch parties. The case (a) of the Duke of Fitz-James may also be noticed, in which Mr. Justice Heath observed, “We all agree that, in construing contracts, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws.”

“By a reference to Dirleton’s *Doubts Resolved and Answered*, p. 227 and 229, it will be seen that the law of Scotland was considered by that most eminent Judge to have the same respect to the *lex loci contractus* in such cases; and the Court of Session have lately so decided as to the payment of 8 per cent. interest on an Indian bond, (b) that being the legal rate in India, though usurious here. That Court also decided according to the law of Holland, as to a Dutch contract, in the case of *Mitchell v. Burnett*, Dec. 11, 1746. *Kilkerran*.

“It appears to me, therefore, perfectly evident, that, both by the law of England and of this country, the *lex loci contractus* ought invariably to be attended to in all questions of marriage or divorce; and this is most reasonable, as the rational presumption is, that the matrimonial connection, formed by the citizens of any country, is made under all the implied conditions of the law of that country to which they belong, and in which they have been married.

“In this country the marriage contract of the spouses is by law *quamdiu se bene gesserint*: But in England it is indissoluble by law (for an act of Parliament is the will of the Legislature coming in place of that of the Pope in Catholic countries, or that of an absolute monarch in a kingdom where his will is the law;) and to the duration of the contract for life the parties bind themselves, before the clergyman and witnesses, in these express words: “I take thee to be my wedded husband (or wife,) to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish,

(a) 1st Puller and Bosanquet, 138.

(b) Campbell. Ramsay, Hannay, and Co. Feb. 15, 1809.

till death do us part, according to God's holy ordinance, and thereto I give thee my troth," &c.

"Now I do, with deference, think, that the dissolubility or indissolubility of a contract is part of its very essence, and that, if the marriage-contract in this case had not been admitted by the pursuer to be indissoluble by the law of England, where it was entered into, this Court must have taken evidences, not only as to the existence of the contract betwixt the parties, but also as to its nature: and particularly, whether, by the law where it was entered into, it was revocable or irrevocable during the lives of the parties; and if the indissolubility were proved or admitted, then, that our Court could only give the remedy which the pursuer might obtain in the Courts of the country where the contract was entered into, and not a remedy totally inconsistent with the very nature of the contract itself:—because, by a peculiarity of our law, marriage in Scotland may be dissolved by divorce.

"Notwithstanding, the pursuer, in her condescendence, has pleaded, that there are many precedents of our law for the late decisions. It appears to me, however, that not one of these cases which have been decided here in the eight and a half years that I have sat in this Court touched on the point of the *lex loci contractus*, excepting those of Hilary, and Tewsh, and Newte, and Russel Manners. And as the defenders in none, even of these last, appear to me to have seriously maintained the indissolubility of the contract, I, with confidence, state, that the only decision *in foro contentioso*, which we have to follow on the present point, is that of Sir Thomas Wallace. I shall, therefore, now shortly mention that case.

"Sir Thomas Wallace married for his second wife (his first wife having divorced him in this Court) Isabella Brunsdone, in London, by the rites of the Church of England; and they resided together for some time as man and wife in England. Sir Thomas went to France. Lady Wallace, when residing in England, raised an action of divorce in this Court against Sir Thomas, as being his *forum originis*. A proof was allowed in absence of Sir Thomas; but he having heard of it, presented a bill of advocacy, which was refused. A reclaiming petition, drawn by Mr. Craig, afterwards Lord Craig, proceeding entirely on the point of the *forum originis*, was also refused; but, on a second reclaiming petition, drawn by Mr. Blair, afterwards Lord President, in which he, in a very clear and able manner, stated the argument that the *lex loci contractus* ought to govern, to which answers were drawn by Mr. Alexander Wight (likewise unquestionably a most eminent lawyer), the Court of Session altered their decision, and "remitted to the Commissaries, with an instruction to dismiss the action." To this judgment that Court likewise adhered, on a reclaiming petition drawn by Mr. Henry Erskine, whose celebrity is well known, with answers by Mr. Blair. From personal communications with which I was afterwards honoured on this subject by that great lawyer (Lord President Blair), I may be permitted likewise to mention, that I conceived his private opinion to coincide with his argument as a counsel on that occasion.

"The *rationes decidendi* of the Court are not indeed distinctly given in the report of that case; but these are clearly to be seen from the printed papers. It will be observed, from a perusal of the whole debate, that the Court thought that the *forum originis* founded a jurisdiction. In Mr. Erskine's petition for Lady Wallace, he says, p. 3,—"Such of

your Lordships as concurred in pronouncing the interlocuter complained of, seemed to take this (*viz.* that there was a *forum originis* to found jurisdiction) for granted, and to rest your opinion solely on this ground, that as the law of Scotland cannot be the *ratio decidendi*, the jurisdiction *ratione originis* can vest no power in the Commissaries to decide this question." And he says again, p. 10,—“For your Lordships first found the defender liable to answer in the Commissary Court *ratione originis*, and afterwards dismissed the action, not from having altered that opinion, but upon this *ratio decidendi*, that the law of a country where a contract is entered into must be the rule for dissolving it; and that the Commissaries had no power to decide according to that law.” And, again, he says, p. 14,—“Now, the only ground for dismissing the action was, that the question must be judged by the law of England, which the Commissaries of Edinburgh have no power to apply.” In the collected report of that case it is also stated, “That the majority of the Court seemed to be of opinion, that there was a *forum ratione originis*, so as to found jurisdiction; but that it was not competent for them, in the circumstances of the case, to pronounce a judgment of divorce between the parties.” A decision which I hold to be founded on the most sound principles of international law.

“The next decision, in point of date, 1794, was that of this Court, in the case of the Duchess of Hamilton; but as this was a case of a Scotch nobleman married in England, undoubtedly with the view of living in Scotland, and as it likewise took place entirely in absence of the Duke, who made no appearance, I consider it of no authority to the present point. I also consider of no authority the case of *Pirie v. Lunan*, in which this Court has dismissed the action as incompetent. But the Court of Session remitted to us on a bill of advocacy, with instructions to alter our interlocutor, and sustain it; for the whole proceedings went in absence of the defender; and the collector, in his report, assigns as the *ratio decidendi* of the Superior Court, that “*there would be no harm to allow a decree to be obtained in absence, valeat quantum valere potest.*”

“The next decision in which this Court followed the rule of judgment in the case of Sir Thomas Wallace, was that of *Moorcombe v. Maclelland*. Our predecessors then pronounced this judgment:—“The Commissaries, considering that the courts of one country ought not to be converted into engines for either eluding the laws of another, or determining matters foreign to their territory, and that decrees of divorce pronounced by incompetent courts cannot effectually and securely either loose the bonds, or dissolve the marriage, or fix the states of the parties thereto, but might become causes or snares to involve other persons, as well as the parties and their children, in deep distress; and observing it to be admitted in the libel, that the marriage of the pursuer and defender was celebrated in England, that they resided constantly in England since their marriage, and that even the crime on which divorce is here demanded to be decreed was committed in England, therefore, find that the action is not competent in Scotland, and ought not to have been brought before this Court, and dismiss this process, in all its parts, for want of jurisdiction and of power.” And this judgment was approved of by the Court of Session.

“The case of *Wyche* against *Burrell Blount* [June 27, 1801] was the next of English parties. They had been irregularly married at

Gretna Green, and had lived as man and wife afterwards in England, and the adultery was committed there; but the defender was personally cited in Scotland, when on duty with his regiment here. This Court found it not proved either that the marriage of the pursuer or defender, who are not Scotch but English by birth, was celebrated in Scotland, or that they cohabited in Scotland as husband and wife after their marriage, or that the defender has had any sufficient or settled residence in Scotland, or even that the crime on which the divorce is founded was committed in Scotland: Therefore, found that the action is not competent in Scotland, and ought not to have been brought before this Court, and dismiss this process for want of jurisdiction." A bill of advocation, in absence of the defender, who made no appearance in the suit, was presented to the Court of Session; and a remit to this Court was given, [June 27, 1801] with instructions "to sustain their jurisdiction in this case, in respect that the summons was executed against the defender when resident in Scotland, and possessing a domicile there; find it competent to refer to the oath of the defender the authenticity of his subscription at the certificate of marriage produced, and that said certificate is genuine, and grant commission accordingly." In consequence of this remit, a commission was granted to take the defender's oath; but he declined to swear, though he admitted his subscription to the commissioner. On consideration of the report, this Court [Oct. 22, 1801] first "found the evidence insufficient to authorize pronouncing a decree of divorce between the parties." But, on a reclaiming petition, and on a more full consideration of the remit, in respect to that direction, they altered and pronounced sentence of divorce.

"This decision, it must, however, be noticed, related to a Scotch marriage, a divorce from which, though the case go in absence, is undoubtedly competent; but I do besides, with all deference, hold, that the principle there laid down in the remit as to the proof of marriage, is contrary to the uniform practice of this Court. So far as I can discover, no such evidence, whether in a declaratory action of marriage, or in an action of divorce (this case excepted), was ever received here. Indeed, it is always the duty of a Consistorial Court<sup>(a)</sup> to sift out the truth by the depositions of witnesses, and other lawful proof, and *not* to give credit to the confession of the parties themselves, though taken on oath, because it is to be presumed that they would in cases of divorce, collude together for the avoiding of their marriage, to the prejudice often of third parties deeply interested. Besides, the Courts of this country have never, as I believe (except in this single case), considered a foreigner to be properly domiciled here, when only here along with his regiment.

"The next reported divorce case, in point of date, [March 8, 1805] is that of Murray against Lindley. In it this Court ordered a condescendence, and allowed a proof, against which the defender petitioned, when our predecessors, "particularly observing that no objection was stated to the jurisdiction of the Court, until after issue was joined upon the merits, refused the desire of the petition." The defender presented a bill of advocation, which was refused, and a petition to the whole Court of Session was also refused. On a perusal, however, of the printed papers, it will be seen that the point of the *lex loci contractus* was

(a) Burn's Ecclesiastical Law, Vol. ii. p. 503, *vide* marriage, l. 11, § 4, 5, Can. 105.

never pleaded in that case, and that the whole argument proceeded on the prorogation of jurisdiction.

“That of Tovey against Lindsay follows. [Jan. 25, 1807.] It was decided by this Court on the 5th April 1805, when it was “found that the Commissaries of Edinburgh have a proper jurisdiction in this case;” and it was removed to the Court of Session by a bill of advocation, a few days before my appointment to this bench; but as I received regularly the printed papers, and was present at the judgment in the Superior Court, I can state from these papers, and from having heard the opinions of the Judges, that the decision was confined entirely to the question of domicil, and that the marriage was at that time never alleged to be English. I am, too, still inclined to think that the marriage of these parties ought to be viewed as a Scotch marriage, at least as a contract entered into (as Lord Mansfield says) with a view to a residence in Scotland; and, therefore, that the law of Scotland with regard to it ought to be the rule of decision. At all events, however, the decision cannot be founded upon as in point here, for the doctrine of the *lex loci contractus* was never pleaded, either in this Court, or in the Court of Session, to the effect of regarding that marriage as English.

“I come now to the opposite cases which have been decided lately in this Court.

“When the case of Paget came before me in August 1810, during the vacation of the other law courts, all my brothers being out of town, I stated that I had very great doubts of the competency of the action as laid; and pronounced this interlocutory order: “*Before answer*, ordain the pursuer to give in a special condescendence of the facts she avers, and undertakes to prove, in support of the conclusions of the libel,” &c. It was my expectation that the point would thus have come to be fully discussed in writing, before a final judgment fell to be pronounced. But the defender made little opposition, and did not plead the *lex loci contractus*; and the pursuer hurried the case as fast through as the forms of process would admit. Thus, a final judgment came to be given [Oct. 12, 1810] by one of our predecessors in time of vacation of the other courts, without argument on the point of the *lex loci contractus*, which was not then brought under the notice of the Court. I have consequently never considered that case as any precedent.

“Upon the next English case of Wilcox against Parry, [Nov. 26, 1810] I again repeated my doubts of the preceding decision; and as there was something like the appearance of a wish to evade our Scotch act (1600, ch. 20), which prohibits the adulterer and adulteress from marrying together, under sanction of nullity, I thought the Court bound to prevent such evasion; and, after consulting with my brothers, an interlocutory order to that effect was pronounced.

“My brothers Tod and Sir Thomas Kirkpatrick having also entertained doubts of the soundness of the decision in the case of Paget, a judgment was afterwards pronounced by this Court, in the cases of Hillary and Tewsh, which carried these cases to the Court of Session by bill of advocation. It appears, however, that the point of *lex loci contractus* was not pleaded in these cases by the defender’s counsel, when argued before the Lord Ordinary on the Bills; and his Lordship [Oct. 12, 1812] pronounced the following interlocutor: “Having considered this bill, and the proceedings before the Commissaries, and been attend-

ed by counsel for the parties, according to the order on the 9th current, who declared that they could not explain to the Lord Ordinary, from the discussions and deliberations in the Commissary Court, the grounds of the interlocutor under review, further than appears from the terms in which it is conceived; and the counsel for the defender having signified that he had not advised his client to litigate in support of that interlocutor, and being in this manner left to his own unaided consideration of what might be said in behalf of the interlocutor, but having formed his opinion thereon, refuses the bill, and remits to the Commissaries with this instruction, to find that the relation of husband and wife is a relation acknowledged *jure gentium*; that the duties, obligations, and rights to redress wrongs incident to that relation, as recognized by the law of Scotland, attach on all married persons living within the territory subject to that law, wheresoever their marriages may have been celebrated, or been followed with cohabitation; that jurisdiction, or the right or duty of the courts of this country to administer justice in such matters, over persons not natural born subjects of Scotland, arises from the persons sued being resident within the territory at the time of their citation and compearance, or being duly domiciled, and being properly cited accordingly, at the instance of a person having sufficient interest and title, and proceeding in due form of law; and that, in this case, the pursuer has condescended sufficiently on the defender's residence in Scotland, to entitle her to institute and carry on her claim in justice against him before the Commissaries, according to the dictates of the law of Scotland in the matter libelled; and, therefore, to recal the interlocutor complained of, and sustain their jurisdiction; and thereafter proceed in common form, as to them may seem just."

"This remit (accompanied by a very able note of the Lord Ordinary) having been applied by this Court, decisions were given in these cases, and in the subsequent case of Lolly, and some others, in conformity to these instructions; but it is proper for me to notice, that all of them were decided only by a majority of this Court, and contrary to my opinion.

"The decision of the twelve Judges in the case of Lolly having been communicated, this Court ordered the cases of Newte and of Russell Manners, then in dependence before it, to be fully argued; and I must admit, that in these cases the English rule of law as to the indissolubility of marriage, which was the *lex loci contractus*, was very ably argued by my friend Mr. Bell. But (contrary to my opinion) we found by our judgment, "That, according to the settled principles of the common and statute law of Scotland, if there be no collusion between the parties, or other valid exception against the pursuer's right of action, adultery committed in Scotland is a legal ground for divorce, without distinction as to the country where, or the form in which, the marriage was celebrated." Accordingly, a decree of divorce has been pronounced in the case of Russell Manners. This decision, however, it must be admitted, as I think, was in opposition to the views which appear to have prevailed in the discussion of the case of Sir Thomas Wallace, though in conformity to the opinion of the Lord Ordinary in the cases of Hillary and Tewsh.

"Since these last decisions of this Court, the point as to the indissolubility of an English marriage, and the power of the Scotch Consistorial Court, or any foreign Court, to dissolve a marriage celebrated at Gibraltar (which place is held to be under the law of England,) has been

argued before the House of Peers, the Supreme Judicatory of the united kingdoms, incidentally in the Scotch appeal of Tovey against Lindsay. From Dow's Reports, and from the speeches of the Lord Chancellor and Lord Redesdale, as printed, with the remit to the Court of Session, it would appear that the opinions of these very learned Lords, in the Court of last resort, were unfavourable to the power or competency of this Court, to pronounce decrees of divorce *a vinculo* of English marriages.

"In the pleadings, (Dow's Reports, p. 123,) Sir Samuel Romilly appears to have argued three points,—1st, Whether the defender, Mrs. Lindsay, had been domiciled in Scotland. 2dly, Whether, if she had not been domiciled *de facto* in Scotland by her own residence here, the wife's domicil did in that special case follow that of her husband, who was a resident Scotsman. And, 3dly, Whether an English marriage, being indissoluble by the English law, could be dissolved by a Scotch divorce.

"Mr. Adam, as counsel for Major Lindsay, having stated that Major Lindsay was married at Gibraltar while in the army, at a time when it was admitted that he had not changed his original domicil of Scotland, the Lord Chancellor observed, (Lolly's case)—"This is the case of a Scotchman marrying in England (for so it must be considered,) where marriage was indissoluble. The twelve Judges had lately decided, that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an act of the Legislature." Mr. Adam, for Major Lindsay, observed,—"This was too serious a point to be considered in this incidental manner upon a question of jurisdiction. It had *not been stated at all in the Court below*. Their Lordships would hardly remit, therefore, upon this ground, as the remit must be applicable to the state of the pleading." The Lord Chancellor observed, (Dow's Rep. p. 124)—"You say that the marriage ought to be dissolved; her answer to that is, that, being contracted within the pale of the English law, it was indissoluble." Mr. Adam observed,—"That was a question of international law; and the Commissaries, since they knew of the decision of the twelve Judges, still maintained their authority to dissolve an English marriage, if the parties were domiciled in Scotland," &c. His Lordship, (a) in giving his opinion to remit this case, observed, "But the fact is beyond all doubt here, that there was a ceremony of marriage (as it appears to me at least) at Gibraltar. That the parties must be considered as parties who were there married; and that it will not be possible, when this matter is sifted to the bottom, to say that the marriage was a marriage in Scotland, to be affected as such by the Scotch law." And afterwards, (Printed Speeches, p. 7) "I call your Lordships' attention to the date of this interlocutor, as I do not apprehend that, at that time, the question had presented itself to the view either of the Consistorial Court or Court of Session, as having so serious an aspect as that question has at this day." His Lordship also mentions the doctrine which prevailed here in the cases of Lolly, Manners, and Newtè, as one "which the twelve Judges of England consider as wrong;" and as to the appeal of Tovey, (Dow's Rep. p. 28,) then suggests, "that the case, on account of the very serious effect that the decision might have upon the civil relations of families, and

(a) Printed Speeches of Lord Chancellor and Lord Redesdale, p. 4.

even upon questions of property, should be reviewed by the Courts below."

"Lord Redesdale agreed with the Lord Chancellor; and, in the course of his speech, observed, (Printed Speeches, p. 12) "If the Courts of Scotland have a right to judge thus of marriage, I do not see why they may not in the same way judge of any other contract; and they may hold, as to all contracts whatever, wherever contracted, and between whomsoever, if they can bring the person of the contractor within their *forum*, they have a right to consider the nature of the contract as bound by their law, and not by the law of the country where the contract was made;" and his Lordship also says, "It should be considered what is necessary for the purpose of justice, and care taken that contracts made with one view may not be disturbed by a law to which the parties, in making the contract, had no reference, and the possibility of which interfering with their contract they never contemplated."

"The remit was in these words, "It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of in the said appeal; and, after such review, to do therein what to the Court shall seem meet and just. And it is further ordered, that the Court of Session do give all proper and necessary directions, as well in said Court as to the Commissaries of Edinburgh, for enabling the said Court of Session effectually to carry into execution the judgment of the said Court which shall be pronounced after such review of the said interlocutors."

"We must extremely regret that the death of Major Lindsay, immediately after that case was thus returned to the Court of Session, put an end to all proceedings, and deprived us of the advantage we would have derived from the discussions and decision upon the remit; but we can, as I think, have no doubt, from the tenor of the opinions delivered by the Lord Chancellor and Lord Redesdale on that case, that the House of Peers conceive that, in all cases of English marriages, this Court ought to adopt for the rule of its decisions the *lex loci contractus*.

"The incalculable importance of the subject has led me to state so fully the authorities and decisions, both English and Scotch, on which I found the opinion I have uniformly held; and I do now, with confidence, say, that it appears to me quite clear, that every authority, and all the decisions of this Court, not pronounced in terms of remits, with the exception only of those later English cases which I have noticed, are adverse to our sustaining such actions. I do also hold, that the principle of law upon which the opinions delivered by the Judges of the Court of Session, in the case of Sir Thomas Wallace, and those lately delivered in the House of Peers, in the appeal case of Tovey against Lindsay, were founded, is the only sound and safe rule of decision for us to adopt in this case, and ought to have been the rule of decision in all the late cases of divorces of English parties married according to the law of England. This principle seems to me to rest on the most just and solid view of international law. For no one can be said to suffer injustice if the judgment is in strict conformity to the contract entered into, however different or more favourable the law of the country may be where the redress is sought.

"While this is my opinion, I cannot keep out of view the consideration, that if the decision of this Court and of the Supreme Court should

correspond with it, the parties to many of the late decrees of divorce will be placed in a most distressing situation, from which they can only be relieved by a legislative enactment, declaring the divorces which have been pronounced in their cases, and the subsequent marriages, to be good. But however I may regret this, I cannot overlook that these parties ought to have applied for a divorce *a mensa et thoro* in the consistorial courts of England, as their proper *forum*, and for a separate aliment there; or ought to have sued for damages in the courts of common law, and then applied for acts of Parliament to dissolve their marriages *a vinculo matrimonii*, instead of resorting to the Consistorial Court of Scotland, in which kingdom the peculiar regulations of the law, both as to the contraction and dissolution of marriage, are confessedly repugnant to those of the country where the marriage was contracted, and where the true and permanent residence of the parties had always been.

“Granting, as I cordially do, that the crime of adultery is a gross violation of the essential rules of morality, in a well regulated society, which ought to be checked and punished, I must also again observe, that this object may be attained by putting in execution the criminal laws of Scotland against adultery. And I am bound to keep in mind, that in England marriage is considered to be so sacred, that, according to the religion and morality of that country, it is thought a great stretch to permit any wife to dissolve it, even by act of Parliament. We all, likewise, know that *sævitia*, or maltreatment, which may be carried to such excess as to become nearly as immoral and hurtful to society as adultery, is only a ground of divorce *a mensa et thoro* in Scotland as well as in England, even in the most extreme case.

“Upon the whole, therefore, I am of opinion, that as the parties in this case are English, and were married by the law of England; as the proper and permanent domicil of the defender must be held to be in England, which is the *locus contractus*; as, by the law of that kingdom, the marriage contract is indissoluble; and as the libel concludes only for a divorce *a vinculo matrimonii*, it must be dismissed, reserving to the pursuer to raise a new action for divorce *a mensa et thoro*, if she shall be so advised.”

*Opinion of Mr. Commissary Tod.*

“THE case now before the Court is unquestionably one of great and general importance, deeply affecting not only the interests of the private parties, but the dearest and most invaluable rights of society at large. It involves at the same time the discussion of intricate questions of law, going near the first principles of general jurisprudence, and reaching to consequences almost unlimited.

“A case, in every sense, so highly important, well deserves to be maturely weighed and considered. But unfortunately in this, as well as in other cases of a similar description which have lately forced themselves upon the notice of this Court, the Judges find themselves placed under circumstances peculiarly disadvantageous. For, notwithstanding the most anxious endeavours on their part to have the subject fully pleaded and investigated, it happens almost invariably that the defender either declines entering an appearance altogether, or if he does appear, he neglects to state seriously any plea or argument in defence. In this manner, the Court feel themselves called upon to determine questions of infinite difficulty and magnitude upon the *ex parte* statements and partial

pleadings on one side, and are left entirely to their own unaided consideration of what may be said on the other.

“In these circumstances, we have to judge the present case, which has been pleaded altogether *ex parte* of the pursuer; and although the opinion I am to give upon it has been formed with all the care and deliberation I can possibly command, still I look towards the question with a degree of diffidence becoming the numerous difficulties with which I see it surrounded. And here it may be proper for me to observe, that although, in the sequel, I may feel myself called upon, by the late consideration which I have given to this important question, to submit an opinion different from that which I some months ago entertained upon a similar case, yet I feel the less hesitation in doing so, when I consider that the views which have now occurred to me, not only better accord with what appears to me to be the right principle of decision, but they seem also to me to receive countenance from the very learned Judge who presides in the Court of last resort, with the inclination, at least, of whose general sentiments upon this interesting subject, we have in some degree been lately made acquainted in an authentic form, by the remit from the House of Peers, in the case of *Tovey v. Lindsay*.

“The facts of the case are few, and, being in absence of the defender, they are hitherto undisputed. It would appear that the parties are both of them natives of England,—that they were married in England in the year 1797,—and that their marriage was regularly solemnized according to the forms prescribed by the English law. It would appear also that they afterwards continued to cohabit as husband and wife in England, and to reside permanently in that country, which may, therefore, be considered as their domicil of residence. The husband, it is further stated in the libel, has, in breach of his matrimonial vows and engagements, committed adultery “both in England and Scotland, and elsewhere,”—and, in particular, it is stated, that he has lately come to this country, where it is alleged he has been guilty of various acts of adultery, which are offered to be proved.

“The pursuer, his wife, having come to the knowledge of these facts, now insists in the present action, which, libelling upon the marriage in England, concludes to have the marriage contract dissolved *a vinculo* on the head of adultery. The execution bears, that the libel was duly served upon the defender “personally apprehended in Edinburgh.” And, in obedience to an interlocutory order of the Court, the pursuer has lodged a condescendence, stating the grounds, in fact and in law, on which she maintains that this Court is competent to entertain this action. The grounds in fact are stated to be, that the defender has resided in Edinburgh for more than 40 days before the present action was raised,—that the acts of adultery charged in the libel were committed in Scotland,—and that he was personally cited here. From these facts, the pursuer infers it follows in law, that the defender is subject to the jurisdiction of this Court by reason of his domicil; and that, being a question of *status*, it must be regulated by the law of the domicil, which, for no other reasons that have yet appeared than those which have been just stated, is held to be in Scotland. The pursuer, finally, at the suggestion of the Court, and with its permission, has made various amendments upon her libel, which, in its original form, was ex-

tremely incorrect. And, in this shape, the cause now comes to be advised.

“The first point, which it seems proper to consider, is the competency of this Court, in respect of jurisdiction, to entertain the present action, and upon this I imagine there can be no manner of doubt. The pursuer, it is obvious, has a sufficient right to sue (supposing it always cleared of the legal suspicion of collusion); and the defender, it is equally certain, besides having been personally cited, has acquired a domicile here, at least fully adequate to all the purposes of founding jurisdiction. Locality I look upon to be the genuine and original source of all jurisdiction, whether it regards persons or things. In the view which I have now stated, jurisdiction arises from the domicile or locality of the person; and, to avoid mistakes afterwards, I wish here to remark—that while, to the extent of citation and convention *in judicio*, mere residence within the territory may suffice for every kind of action on which a defender may be called, and mere presence for many,—yet I conceive it to be perfectly plain that, as to the issue or conclusions of actions, *that* short, perhaps momentary, local presence which suffices for criminal jurisdiction upon delinquencies committed within the territory of the Judge, cannot be sufficient to furnish a rule for trying questions affecting the *status personarum*. This distinction, I apprehend, must be carefully kept in view, to avoid confusion in any argument respecting domicile, as on the one hand affording ground for citation and convention to an action, and, on the other, as furnishing the rule of law by which a question of civil right falls properly to be determined. In the present instance, accordingly, I take it for granted, that the local temporary residence of the defender in this territory, and the personal citation he has received to this action, are of themselves fully sufficient to bring him within the immediate jurisdiction of the Court. In every view, therefore, we are bound to enter upon the consideration of the present question, whatever may be the ultimate result of that consideration.

“But, however clear the question of jurisdiction, as viewed in this manner, may be, it is by no means so obvious by what rule that jurisdiction is to act. Here, indeed, lies all the difficulty and delicacy of the question—a question which, when viewed practically, involves so many perplexing consequences, that it seems almost impossible to extricate it.

“There exists a radical and original difference betwixt the marriage law of England and Scotland. It is unnecessary for the present purpose to trace the history of this difference,—it is sufficient merely to state the fact. In England, we know that marriage is indissoluble. But, by the law of Scotland, divorce *a vinculo matrimonii*, on the head of adultery, is permitted. In the law of England, that species of divorce (excepting by the overruling force of an act of the British Legislature *pro re nata*) is utterly unknown. The English law recognises not the greater divorce *a vinculo*, but merely the lesser, or separation *a mensa et thoro*. The question, then, is,—By which of these systems is the present case to be ruled? Whether by the law of Scotland, which, by the pursuer, is taken to be the *locus domicilii*, or by the law of England, which is the *locus contractus*? It is impossible to conceive a case where the apparent collision between the laws of the two countries can present itself in a more interesting form; and there can be no case where it is more important to reconcile, if possible, that collision, upon a just

and dispassionate consideration of the principles which may be applied to it.

“It may, perhaps, contribute to remove some of the difficulties attending the question, to begin with considering the precise nature and object of the action of divorce, as entertained in this Court,—to consider, in particular, whether it is not purely a civil remedy *ad privatum effectum*, or whether it does not, in some degree, partake of the nature of a criminal suit *ad vindictam publicam*. And it becomes the more material to ascertain this with precision, because, when a similar question was last before the Court, there existed (at least with regard to myself) a considerable degree of misconception, in consequence of not distinguishing sufficiently betwixt the *criminal* act of adultery, and the *civil* remedy which it affords.

“There is, however, no distinction better known than that which exists betwixt *civil* and *criminal* law, or between *criminal* prosecutions and *civil* actions. The same facts may be prosecuted either criminally or civilly, or both. But *criminal* actions differ completely from *civil*, as well in their form and object, as in the principles by which they are regulated. Facts are tried criminally, in the proper criminal Courts, at the suit of a public prosecutor, to satisfy the ends of public justice, and by principles of law, and rules of procedure, which are strictly local and territorial. Civil actions, on the other hand, are brought into the civil courts by the private party for his own redress or indemnification; and more enlarged principles of jurisprudence, founded in considerations of equity and general expediency, may be applied to them.

“Accordingly, by the law of this country, adultery may be made either the foundation of a criminal charge *ad vindictam publicam*, or of a civil remedy to the private party who has been injured. It is accounted here so high a breach of moral and social duty, that it has been made to rank in the class of *crimes* punishable, in some cases, even capitally. It is true, that this part of the criminal law has not for many years been put in execution. Nevertheless, the transgression still retains its degree and character, as settled by the authority of the nation in the penal code; and it is to be presumed, therefore, that the proper criminal courts of the country, whose peculiar province it is, and who are alone vested with jurisdiction to punish it, will protect the purity of public manners in this respect, and will carry into effect the laws provided against the offence, whenever there shall be occasion for their exertion.

“But, with adultery, in a *criminal* consideration of it, or with a view to its punishment, either as a *crime* or as an offence against the domestic order of the state, it is perfectly certain that this Court has no manner of concern. It is only as it stands connected with a *civil* remedy, and as the foundation of a *civil* action *betwixt private parties*, that we can take cognizance of the crime of adultery. The action of divorce, as entertained by this Court, I understand, in a word, to be purely *civil*. It is, no doubt, in some degree *penal*, as it draws after it the forfeiture of the personal *status* of one, and, in some sense, of both the parties; yet penal actions, in our system of jurisprudence, were never put under the head of criminal law. It originates also in a criminal act, on which account, perhaps, the concurrence of the fiscal is required; but this circumstance, in a question betwixt the husband and wife, does not affect the civil quality of the action, more especially as there is no conclusion either for a fine or for damages.

“In many cases, civil courts are called upon to try, incidentally, facts of a criminal description, when pursued merely *ad civilem effectum*. Thus, in the case of assythemment, the fact of murder may be tried incidentally by the Court of Session. Thus, again, in civil cases, the right of peerage may be discussed in ascertaining the validity of a freehold qualification. In like manner, the crime of adultery is tried incidentally in this Court, as the ground upon which, if the adultery is proved, the consequent decree of divorce is to proceed, as the mode of redress to the private party who complains.

“The right of divorce, it will also be observed, may be prosecuted here, upon proof of adultery committed in England, or in any other foreign country. In this view an English party may sue divorce here upon acts of adultery committed in England, as well as in Scotland. In the criminal prosecution of adultery, the *locus delicti* is every thing; but in a civil sense, and in considering the merits of the civil action of divorce, the *locus delicti* is comparatively nothing. It is perfectly immaterial, viewed in this way, where the adultery is committed,—which, of itself, clearly shows that the legal character of the suit ranks it, with complete certainty, in the class of *civil* causes.

“It ought, indeed, always to be remembered, that beyond what is necessary for explicating its own authority, this Court possesses no criminal jurisdiction, being, in its institution, object, and forms of procedure, absolutely civil. This, accordingly, is the view taken of it by Dirleton, a name of great and acknowledged authority in any question of Scottish jurisprudence, and more especially in a question regarding the constitution or jurisdiction of this Court, he having many years filled with much ability the situation of a judge in it.(a) “Commissariots (he distinctly observes) are acknowledged to be *merely civil*, because summons are direct by the Commissaries under the signet of office, bearing his Majesty’s name and arms; the certification is *civil*; witnesses are summoned under *civil* and pecunial pains; and letters are directed for compelling them to compear under the pain of horning; the execution of sentences is *civil*, by poinding or comprising for liquidate sums; or by a charge to fulfil what is *in facto* upon the Commissary’s precept; or by a charge of horning upon the letters; and by intenting action of deforcement before the Commissaries or the Lords of Session.” Hence, therefore, whatever may be the ultimate judgment of the Court in this cause, we should be cautious of the appearance even of making it rest upon principles peculiar to criminal jurisprudence; otherwise we may incur the charge of attempting to usurp a species of jurisdiction with which we ought to have no manner of interference.

“Keeping these observations in view, I proceed to consider more immediately the leading and general question, Whether or not, in a case of matrimonial *status* like the present, the law of the domicil should prevail in opposition to the law of the contract? The pursuer contends that it should; and her argument seems to lead to this conclusion, that in all questions involving the consideration of *status*, or that particular relation of domestic life which arises from the matrimonial union; neither the private agreement of the parties themselves, nor the law of the country in which the relation was constituted, can control or stand in the way of the law of the domicil at the period of commencing the action.

“Before, however, coming to a conclusion so extremely important, and before the Court can be expected to give their assent to it, it would appear proper to ascertain, with more precision than the pursuer seems to think necessary, what species of domicil it is which is to carry along with it such important consequences.

“The pursuer has been particularly called upon to condescend on the grounds, in fact, on which she maintains that this Court is competent to entertain her action. She has accordingly stated that the defender has resided in Edinburgh for more than 40 days; that he has been personally cited here; and that he has committed adultery in this country. And these facts she seems to rely on as sufficient, as well to sustain the jurisdiction of the Court, as to furnish the rule according to which it ought to proceed in trying the merits of the cause.

“It appears to me, however, that something more should be required towards the constitution of a domicil, which is to furnish the rule of law, by which an important question of civil *status* is to be tried, than when it is to be the mere ground for founding jurisdiction to the extent of convening the party *in judicio*. In this last view, domicil is ascertained by legal presumption to a particular effect. “A rule is received by custom, (says Mr. Erskine), (a) that where one has resided with his family for 40 days immediately preceding his citation, it is to be deemed his domicil, *as to the question of jurisdiction*.” But although such a rule as this is received with us, to limit the jurisdiction of Judge Ordinaries, it by no means ascertains what domicil is, in a larger sense, in which a whole kingdom or territory may be said to be the place of the domicil. In this sense, a man’s legal domicil is the place where he has fixed his permanent residence; the place in which his strongest connections have been formed; and where the seat of his fortunes is permanently established.

“When, therefore, in the present case, the pursuer states that the defender has resided here for more than forty days previous to his citation, I admit she has condescended sufficiently for all the purposes of jurisdiction. But I am not prepared to say that she has hitherto done any thing more. It is true, she has stated, in addition, that the defender has been guilty of adultery in this country; but the *locus delicti*, I have already had occasion to observe, however important it may be in the prosecution of adultery, considered as a crime, or as a breach of police, is of no manner of consequence, when viewed as the ground of a civil action between private parties; in which view alone this Court can take cognizance of it.

“That species of domicil which is required to furnish a rule of law, by which the civil rights of parties are to be governed, is, I should conceive, to be ascertained from facts and circumstances. What, then, is to be held the defender’s domicil in the sense which is here required? He is a native of England; he formed the permanent connexion, which has given birth to this action, in England; and he appears to have chiefly resided in that country. On the other hand, having been occasionally in Scotland, where he is said to have committed adultery, he has been personally cited to appear in the present action at the instance of the private pursuer, his wife. If, therefore, betwixt the defender’s transient residence in Scotland, and his birth and more permanent connexion with

(a) B. i. tit. 2. §. 16.

England, I am called upon to say, which of the two countries is to be accounted his legal domicil, to the effect of trying this question, I should certainly be inclined to give England the preference to Scotland; and, consequently, in this view, there could be no collision in the present case, as the law of the domicil would then concur with the law of the contract, in affording the rule of judgment.

“But supposing even there was a greater confliction between these laws than I am at present aware of, the question comes to be, Is it not possible in the present instance to reconcile them? Or, if they cannot be reconciled, to which of them are we to resort in judging this case? This question is no doubt nice and delicate; but I think it may be satisfactorily resolved.

“The *lex domicilii*, it must be admitted, is of great and deserved authority. It is, in truth, the proper source of all jurisdiction, and, with certain exceptions, the general standard by which all questions of a personal nature should be tried.<sup>(a)</sup> To cases of personal *status* in particular, where such are constituted by the act of the law, for example, the *status* of a major or a minor, the *lex domicilii* is peculiarly applicable. Accordingly, upon looking into the authors who have treated the subject, I observe that, by a great weight of authority, the general opinion is, that in all cases of this description, the law in question should prevail. In such cases the general rule is, “*Quando lex in personam dirigitur respiciendum est ad leges illius civitatis, quæ personam habet subjectam.*”

“But none of the learned names to which I have alluded, as far as I have been able to discover, expressly say, that the general rule is to be taken without an exception; they do not say that, in a question betwixt private parties, the law of the state, “*quæ personam habet subjectam,*” is to prevail where it is opposed by a contract previously executed between those parties. So far from this, the learned author who lays down the rule which has been just quoted, seems to make the case of a contract intervening an express exception from the general rule. (Dieg. sect. 8.) “*Addimus, tamen limitationem, (he writes) si alteri V. G. Contrahenti cum tali persona jus jam quæsitum sit.*”

“In the present instance, however, there is a pre-established contract between the parties. The Court, it will be remembered, are here called upon to dissolve a marriage contracted in England betwixt persons whose established residence, both before and after the marriage, was in England, where the marriage-contract is known to be indissoluble. The previous inquiry then should be the effect of that contract in the existing circumstances of this case.

“This question, though instituted in a Scotch Court, originates in an English contract, which to us is matter of foreign law; and which, therefore, *jure gentium*, must be tried by reference to the law of the country where the contract had its origin. In such a case, the established principle of the law of Scotland is, [Ersk. b. iii. tit. 3. § 40.] “That all personal obligations or contracts, entered into according to the law of the place where they are executed, are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in Scotland, or according to all the solemnities of the Scottish law.” This is a rule of international law, founded in justice and universal expedien-

(a) Voet, de Status, § 7, 8, *et seq.* Hertius, de Collisione Legum, § 4, 5, *in fine*, and § 8.

cy. It is resorted to by the universal consent of nations; and, generally speaking, it is held to regulate as well the constitution as the duration and dissolution of personal rights of every description.

“In the ordinary case of civil obligations of a pecuniary nature, the application of the *lex loci contractus* is then undoubted. In like manner, in the *constitution* at least of contracts involving matrimonial *status*, the same rule unquestionably applies; for every one knows, that, by the law of nations, marriage duly celebrated, according to the law of the place where made, is valid and effectual all the world over. But in judging of the *effects* of the marriage-contract, and in defining the rights which it confers on either party, it has been said that these must be modified and controlled by the various changes which may afterwards take place in the domicil of the offending party.

“The unqualified admission of such an arbitrary rule of decision seems, however, to me to be pregnant with the most serious mischiefs to marriage, the most important of all the relations of society. If, for instance, such a temporary residence as occurs in this case were to constitute the rule for determining the question of matrimonial *status*, the marriage state, contrary to its very essence and nature, would be rendered loose and unsettled, by being made subservient to the capricious views of the married pair, as often as they inclined to move from one country to another. In particular, the English marriage contract, which is sacred and inviolable, might be subverted at the will of either of the parties who chose to come to this country for a residence merely of 40 days, or even of one day, if served with a personal citation; and thus an unjustifiable temptation would be held out to married persons, not only to violate their sacred vows and engagements, and, with these, all the important legal provisions dependent upon them, but also to commit openly a fraud upon the law of their proper domicil.

These consequences, which are far from being imaginary, must inevitably follow, were the mere transient residence of the parties to afford the rule of decision; and although, perhaps, from the less frequent changes which would then occur, they might not exist in the same distressing degree, if a more permanent domicil were required, nevertheless, in my humble apprehension, even then they must still take place to an extent sufficiently alarming, in every case where the domicil happens to run counter to the agreement of parties and to the *lex loci contractus*.

“In these circumstances, and looking to such extraordinary and inconsistent results with a degree of alarm, I cannot think that any principle which is to lead to them can be correctly applied. It will be necessary, therefore, to have recourse to some other principle; and it appears to me that, in a question of matrimonial *status*, even more than in any other question, none can be safer or more expedient than the *lex loci contractus*. The relation constituted by marriage is unquestionably the most sacred and important of all the relations in civil society, and that which it most concerns the citizens of every state should be fixed and determined. If, therefore, the principle of *comitas*, or concession by one foreign state to another, is at all to be admitted, it appears to me impossible to imagine a case which calls more loudly for its application than the case of marriage. Upon just and enlightened views of international jurisprudence, the courts of this country every day give effect to other ordinary foreign contracts, and to all their adjuncts and qualities; and why this should be denied to civil questions affecting

either the rights, or the *status personarum*, arising out of the relation constituted by the marriage-contract, I confess I cannot easily comprehend. If the mode of constituting the relation, as well as the relation itself, is received, I cannot perceive the consistency of not receiving, at the same time, the modifications of it. By analogy, clearly, the principle of *comitas* should be extended thus far: and, accordingly, I see it expressly so laid down by *Huber*,<sup>(a)</sup> who, after stating that marriage, if lawful in the place where it is contracted and celebrated, will be valid and effectual everywhere, distinctly adds,—“*Porro non tantum ipsi contractus ipsæque nuptiæ certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam jura et effecta contractum nuptiarumque in iis locis recepta ubique vim suam obtinebunt.*”

“It is by a strict adherence to this principle alone that the numerous and important rights and interests dependent upon marriage are to be maintained. Whenever, therefore, a contract or *quasi* contract intervenes, it ought to be the governing rule, although the parties may happen, from motives of choice or necessity, to have subsequently changed the place of their residence. Once lawfully executed, there appears to be the strongest reason, in justice and expediency, to uphold the contract according to the original intention of the parties, and the express stipulation of their agreement. It is the duty of the parties contracting to perform their respective stipulations; and it is the duty of courts of law to enforce that performance, where it is attempted by either party to be evaded. As, therefore, in the present case, the parties have voluntarily contracted an indissoluble agreement,—indefeasible in its own nature, and by the law of the country where it was made, it does not appear that this Court, in judging between those parties, can competently invert that agreement, or impose upon them rules and regulations which they never contemplated—for which no provision is made, either by their contract or by the law of England, and for which no effectual provision can be made by the law of this country. In a word, in every case of civil right between parties, and more especially in a case originating in a marriage-contract, the legal contract of these parties is the surest and most unerring guide by which a court of law can walk; and, if possible, the conditions of the contract ought never to be departed from.

“Although however the *lex loci contractus* commands universal obedience from its equity, nevertheless, like every other general rule, it is not to be received without limitation. The rule holds only where it does not stand opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied. If these are in any way threatened or endangered, the rule ceases and will not be enforced; because it is the first law of every state to preserve its religion pure, and its institutions entire. There is, however, no danger of this kind to be apprehended, as far as I can see, from the application of the general rule to the present case.

“Infidelity to the marriage bed is no doubt a great offence, and ought to be checked in every well regulated society. But it does not therefore follow, that the absolute dissolution of the marriage-contract is a matter of essential moral right; or that there is any thing immoral in resisting such dissolution, and in saying that it ought not to take place even in the case of adultery. The characteristic feature of the marriage-

(a) Huber, de Conflictu Legum, sect. 9.

contract, even in this country, is its permanency. It originates, no doubt, in the *will* of the parties; but after being contracted, the *duration* of the union is totally independent of their will. In entering into the marriage state, it is expressly declared that the parties shall be joined together *till death shall separate them*; and in this the marriage-contract is distinguished from every other species of contract.

“It has been sometimes loosely said, indeed, that, in the law of Scotland, marriage is considered as an ordinary civil contract. This, however, is a loose and inaccurate form of expression, to be used only in speaking of the *mode* in which marriage may be constituted, but never when the essential *nature* of the relation itself is the question at issue. For, if it is meant by such language to assimilate the marriage contract to other civil contracts, and to subject it to the same rules to which these are subjected, no idea in my opinion can be more full of danger in itself, and none certainly more distant from a just notion of what the relation constituted by marriage really and essentially is by the law of this country.

“Marriage, (a) in its origin, is a contract of natural law, antecedent to its becoming in civil society a civil contract. Superadded to this, in most civilized countries, acting under a sense of the force of sacred obligations, it is a religious contract, the consent of the individuals pledged to each other being ratified and consecrated by a vow to God. This, generally speaking, is the idea of marriage as entertained in every country where the Christian religion prevails. It is precisely the view taken of it by the more ancient regulations of the canon law, even before marriage was by that law elevated to the dignity of a sacrament. The canon law, however, at least those doctrines of it which were not infected with the corruptions afterwards sanctioned by the Council of Trent, is, under various modifications, the known basis of the matrimonial law of Scotland, as it is every where else in Europe. “Totam hanc questionem pendere a jure Pontificio,” (b) says Craig; and although the idea of a sacrament in marriage, and the quality of indissolubility are in our municipal institutions alike disregarded, nevertheless, in strict conformity to the decretals and other books of the more ancient canon law, still we reverence marriage, as being of divine institution, and regard it on that account as a sacred and irrevocable obligation.

“Accordingly so it is invariably represented by all our authors. Lord Stair, (c) in particular, our great institutional writer, in treating the subject of marriage, constantly talks of its “perpetuity,” and of its being a contract as well of natural law as of divine origin. Lord Bankton (d) uses similar language; and Mr. Erskine (e) expressly says, “the character of perpetuity seems to have been impressed on marriage by God himself in its first institution, when he declared the two common parents of all mankind to be one flesh, *Genesis, ii. 22, et sequent.* which was afterwards improved by our Saviour’s injunction, that no man should put asunder whom God had joined, *Matt. xix. 6.*” “For these reasons,” he concludes, “marriage cannot, by the usage of Scotland, be dissolved till death, except by divorce, proceeding either upon the head of adultery, *Matt. xix. 8, 9; Mark, x. 2; or of wilful desertion, 1 Cor. vii. 15.*”

(a) See Dodson’s report of Sir William Scott’s judgment in the case of Dalrymple, p. 11.

(b) Craig, Lib. ii. Dieg. 18. sect. 17.

(c) Stair, b. i. tit. iv. sect. 1, 2, and 5.

(d) Bankton, b. i. tit. v. sect. 1 and 103.

(e) Erskine, b. i. tit. 6. sect. 37.

“The genius and tendency of the law of Scotland is, therefore, clearly in favour of the perpetuity of marriage. It encourages the duration of the marriage union, and discourages the dissolution of it. It affords every facility towards entering into the married state, and views with suspicion and alarm every attempt to dissolve it. “*Solutionem matrimonii difficiliorem debere esse favor imperat liberorum*,” L. 8. Cod. de Repud. was the maxim even of the Roman code, as it is unquestionably of our own.

“It is true, indeed, in certain circumstances, the dissolution of the marriage-contract is permitted; but it will be particularly observed, that the law of divorce in this country is barely *permissive*, not *imperative*;(a) and nothing can afford a better illustration of what law sometimes does, when, as in the case of divorce, it tolerates what it neither commands nor approves.

“The remedy of divorce is, in truth, but a mournful remedy; and it is one which the law dispenses with an unwilling hand. This is manifest from the principle which runs through the whole proceedings in the process of divorce. A jealous anxiety to disregard every admission marks every step. Hence no judgment passes by default without proof; and if the defender declines to appear, the Court are nevertheless bound to proceed with the same formality as if he were present, and had maintained the keenest opposition. In the same spirit, every obstacle that presents itself is eagerly laid hold of to support the marriage, and prevent its dissolution. Thus, collusion between the parties, *remissio injuriæ*, and other personal bars, are received as proper exceptions to the action of divorce.

“Farther, it is to be observed,(b) that adultery of itself does not operate a dissolution of the marriage; it is merely the mean or ground for seeking a dissolution of it. The action of divorce itself is of the nature of a pure personal cause of complaint, which neither the public nor any third party, upon even the strongest ground of patrimonial interest, will be allowed to plead. And this, by the way, shows clearly the fallacy of the argument, that marriage being *publici juris*; so must necessarily be divorce; and that both are therefore beyond the control of private parties. Marriage, no doubt, is *publici juris*, but divorce, by the law of Scotland, unquestionably is not. Divorce is no public vindication of the law, but a private remedy merely, and for private purposes. It is a remedy which the injured party alone can seek;(c) and if that party is willing to abstain from demanding it, the marriage will still subsist, and the rights and privileges of the parties will remain the same, just as if the adultery had never been committed.

“When all these things are considered, it appears to me that there is nothing here to induce a court of justice to depart from a general rule of acknowledged utility, or to prevent it from judging in the case of a marriage-contract, as, in every other question arising from a civil contract executed abroad, according to the law of the place in which it was executed, and in contemplation of which the agreement was made. Neither the general policy, nor the manners of this country, can require that

(a) See Huberi Prælectiones, Tom. II. lib. i. tit. iii. sect. 9.

(b) Stair, lib. i. tit. iv. sect. 7. Ersk. b. i. tit. vi. sect. 43. Hume upon Crimes, Vol. II. p. 309.

(c) See L'Esprit des Loix, Liv. 16. c. 3.

such a sacrifice should be made to them, as that this Court should assume to itself the power of dissolving an union, which, by the laws and religion of the country where it was celebrated, is accounted sacred and inviolable; which, even in this country, though not in the same degree, is, nevertheless, in relation to its duration, regarded with so much veneration, that every attempt to infringe upon it is watched with a jealous vigilance, and every judgment dissolving it pronounced with an evident reluctance.

“As to the evils which may be supposed to arise from an adherence to the foreign rules, they appear to be in some measure imaginary. Indeed, perhaps, they may be encouraged more by departing from the rule than by adhering to it; for there is, I am afraid, too much reason to suspect that English parties may be found profligate enough to come down purposely to this country to obtain, by their infidelities, from the law of Scotland, the dissolution of a tie, from which, in their own country, they cannot be released. Divorce apparently may be the object to which their infidelity points; and the hope of obtaining it is therefore an encouragement rather than a restraint on the crime. To refuse them this remedy would then, perhaps, be to present the most effectual check to their licentiousness. If, however, this should fail, and if they should still continue in the career of vice, in any degree that should be deemed offensive, the criminal courts of the country, who are armed with the power, would interpose their authority; and by punishing the crime, would effectually vindicate the purity of public morals.

“In every view, therefore, I am inclined to be of opinion that, regarding this as a civil question betwixt private parties, we are called upon to judge between those parties according to the rule of law by which their rights have been established. We are called upon, in short, in relation to this particular case, to determine the effect of a foreign contract of marriage, to which I consider this Court has undoubted competency of jurisdiction. Consequently, upon proof of any alleged breach of this contract, we must, agreeably to acknowledged principles of international law, give to the present private pursuer the same species of remedy to which she would have been entitled, were she now suing before a competent English court.

“In considering, however, what that remedy should be, it is impossible to overlook the anomalous situation in which the pursuer is apparently placed, with a reference to the action in which she now insists. The right of divorce, to whatever extent it may go, originates in the marriage-contract. It forms a constituent part of that contract; and, therefore, in every case of divorce, the proceedings must necessarily be grounded on the previous fact of marriage. The pursuer, accordingly, in the present instance, founds her action upon a marriage-contract celebrated according to the forms prescribed by the English law; which, by the operation of that law, and by her own express agreement, signified in the very terms of the contract, is acknowledged to be indissoluble. Nevertheless, with a visible inconsistency, she calls upon this Court to allow her a proof of alleged acts of adultery, to the effect that this English contract may be dissolved. Here, it is obvious, that the conclusions of the pursuer's action are at complete variance with the premises on which it is laid. In drawing them, the pursuer plainly reprobates the very contract which she approbates; and it ought, therefore, to be considered how far she can be permitted to act thus incon-

sistently; and whether, upon such premises, she is not barred *personali exceptione* from insisting in the present action to the extent of those conclusions.

“Although, however, I apprehend that, in seeking from this Court the absolute dissolution of a marriage contracted in England, the pursuer is requiring a species of redress which she has no right to obtain; yet, as for every wrong there must be a remedy, I am clearly of the opinion I have already expressed, that she is entitled to receive from us *ex comitate*, and upon principles of international law, the same measure of justice which she would have obtained, upon a similar violation of the marriage-contract in an English court. The redress for such a wrong, I presume, would be a release from the marriage *a mensa et thoro*; and although it is no doubt a novelty in the *practice* of the Court, upon proof of adultery, thus to limit the remedy, yet, in *principle*, there seems to be nothing to prevent us from doing so when the case occurs. That the case will occur seldom is obvious; because it is not to be thought that natives of England, married there, will often have occasion to seek here, what they can more conveniently obtain in their native courts. But yet, if it should occasionally so happen, I am not aware that, either from the constitution of the Court, or by any rule or practice known to me, we are tied up from distributing a suitable measure of justice to parties so circumstanced. We possess unquestionably the greater power of dissolving *a vinculo*; and I can see no reason why that should not include the lesser, of releasing *a mensa et thoro*, as often as we may be called upon to exert it.

“Before concluding, I have only farther to remark, that, in the course of the observations which I have thought it my duty to submit upon this case, I have purposely abstained from referring to any of the decided cases which may be thought to have a relation to the merits of the present question. None of them that I know of should, I humbly think, have much weight upon the general point of law, which now excites such universal interest in both countries. In the more early cases of divorce, it does not appear that the intention of the courts of this country was ever particularly directed to the examination of a subject which has now assumed the most serious aspect. And although, in some recent cases, similar to the present, this Court has been accustomed to dispense the law of Scotland, as applicable to the case of a Scottish marriage, yet, in a question of the present important character, this can by no means be held as conclusive. The general question, I conceive, will not be ultimately determined upon such authority, but upon the just application of those principles of universal jurisprudence which regulate the intercourse of nations. The question I therefore look upon as new and untouched; and it must be determined not upon the authority of decided cases, but by such an application of general principles as will unquestionably lead to a result more beneficial to both countries than the rigid adherence to a practice which does not appear to be strictly reconcileable to any principle.

“Upon the whole, therefore, and upon the grounds which I have stated, perhaps at too great length, the conclusion I come to is, that if the pursuer is not barred, *personali exceptione*, from insisting in the present action, to the effect of obtaining a dissolution of her marriage *a vinculo*, this Court, at all events, cannot, in the circumstances of the case, give her sentence of divorce to this effect. We can give her no

more than that which she would obtain in England; and I am therefore for dismissing the action as incompetently brought in its present form; reserving, however, to the pursuer to insist in a more regular action of separation *a mensa et thoro*, as accords."

*Opinion of Mr. Commissary Ross.*

"The case now to be determined is one of the very highest possible importance, and is attended with very considerable difficulty. I was not a member of the Court when it last decided some cases of a similar kind. Having now been called to consider the point, I have endeavoured to give it all the attention in my power; and, after weighing the difficulties which appeared to me to attend it, I am at last come to the opinion, which I am now prepared to deliver.

"The action before us is an action of divorce, on an alleged ground of adultery, concluding for the dissolution of a marriage-contract entered into in England—by English parties—at the time of their marriage permanently resident in England—and which must, therefore, in every point of view, be held to be an English marriage. Were it the case of a marriage entered into here by inhabitants of this country, the ground alleged is, of course, a relevant ground of divorce; but, by the law of England, a marriage contracted there is held to be indissoluble, and the pursuer would, therefore, in her own country, be entitled only to a limited species of divorce.

"I am aware it is disputed by some, whether an English marriage can, in a proper sense, be termed indissoluble, as the inability to obtain a divorce *a vinculo matrimonii*, according to them, is not so much owing to a quality in the contract, as to a particular constitution of the courts of that country. But the question, how the law of England stands as to this point, is, I conceive, a matter of fact to be established to us by evidence; and we have here the very best possible evidence that the case admits of, the solemn unanimous judgment of the twelve Judges of England, declaring, that, by the law of England, a marriage contracted there is indissoluble. They must unquestionably know what their own law is, as to this point; and we are, therefore, bound to hold the indissolubility of an English contract as completely established, without the necessity of inquiring, whether the indissolubility does in reality proceed, from any peculiarity in their courts, or from any other cause.

"In pronouncing a decision in a case like the present, we are not to be influenced by any consideration of the effect which the laws of England may be inclined to give to our sentence of divorce, if we should feel ourselves constrained to pronounce it. We possess no controlling power beyond our own limits, and parties must take all consequences of this kind upon themselves.

"There here occurs a collision between the laws of the two countries; and the difficulty which arises is to determine, which of them is to yield to the other. I observe it stated somewhere in the papers given into this Court, in the former cases, when the same point as the present was argued, though I cannot imagine it ever could be meant to be seriously advanced, that, in reality, there was here no collision of the laws of the two countries at all; because, by the law of England, no penalty attached to a party for obtaining, or attempting to obtain, a divorce before the courts of another country, nor was any inquiry made relative to his conduct on his return, provided he did not proceed to enter into a second marriage. But, according to the same reasoning, it might be

easy to prove, that no such thing as a proper *conflictus legum* ever did, or ever could, possibly occur. If there ever can be such a thing as a real collision, I apprehend an instance of it is to be found in the case now before us.

“It is obvious that, strictly speaking, the law of England cannot claim any right to suspend or supersede the natural operation of our own law. We are here sitting as Scotch Judges in a Scotch Court; and if we are to recur to the original understanding and practice of independent states, the law of Scotland, and that alone, must regulate the nature and extent of the remedy which the pursuer is entitled to demand from us. The laws of different kingdoms are properly territorial, and originally had no operation conceded to them, beyond the limits of the particular kingdom where they happened to be enacted. Every municipal system of law had its operation confined within its own territory, and exerted its controul over the rights, interests, and actions of every person found even accidentally within them, without distinction or limitation.

“But in consequence of the increased intercourse which has progressively taken place among different nations, a change in this respect has been gradually introduced. Kingdoms have become willing to allow effect virtually to be given within their own limits to the laws of other states, in regard to foreigners and their contracts—the operation of which those other states possessed no controlling power to enforce. Such a concession on the part of any state, cannot be regarded as compromising its own supreme authority, or implying any surrender of its own rights of independence or sovereignty. It originates only in a conviction that the recognising a principle of *comitas*, is as much for its own individual advantage, as it is deeply founded in views of general expediency; and that were each state to insist rigidly on enforcing, in all cases, on foreigners its own municipal laws and regulations, its own subjects must expect to be subjected to a similar system of rigour in their turn, in the different countries to which, in the course of their various pursuits, they might happen to resort.

“But while the principle of *comitas* is in this way generally recognised by all states, it is so with considerable variation as to the degree to which it is carried. It is, therefore, necessary, where a *conflictus legum* occurs, to inquire how far, according to the practice of our law, or on ground of analogy, we must be understood to carry the principle—how far we allow the laws of a foreign country to be pleaded against those of our own—so as to regulate the determination of questions coming before the courts of this country. “As a consequence of its liberty and independence, (says Vattel, p. 52, sect. 14 and 16,) it exclusively belongs to each nation to form her own judgment of what she can or cannot do,—or what is proper or improper for her to do,—and, of course, it rests solely with her to examine and determine, whether she can perform any office for another nation, without neglecting the duty she owes to herself. The duties we owe to ourselves being unquestionably paramount to those we owe to others,—a nation owes to herself, in the first place, and in preference to all other nations, to do every thing she can to promote her own happiness. When, therefore, she cannot contribute to the welfare of another nation, without doing an essential injury to herself, her obligation ceases on that particular occasion, and she is considered as lying under a disability to perform the office in question.”

“The contract before us is a contract of marriage. Before stating the essential distinction which exists betwixt a contract of marriage, and an ordinary case of civil contract, I shall first state what effect is given to this last, by our law, in the case of foreigners.

“It is now held that full effect is to be given to a contract entered into abroad, if the forms and solemnities requisite to its validity in the foreign country have been duly adhibited, although they should be in every respect different from those in use among ourselves. Our deference for the foreign law, or, in other words, the *comitas* we exercise towards it, goes this far, that when the validity of any deed is in question, as far as form is concerned, we look to what is required for this purpose, by the law of the country where it is entered into. If valid there, we give full effect to it; but always under this limitation, that our doing so does not affect our own essential policy or institutions, or the interests of morality in our own country.

“So far have we been desirous of carrying our *comitas* in this respect, that even in cases where the stipulations in the foreign contract are adverse to our own law, and amount to a statutory offence, our courts lend their aid to enforce them. The case of Campbell against Ramsay and Company, decided on the 15th February 1809, is an instance of this, where, upon a contract made in India, stipulating eight per cent. interest, a question arose, whether more than five per cent. could be demanded here, where a higher rate would be deemed usurious, and subject a party to the penalties of usury. The Court decided that the law of India, the *locus contractus*, should be allowed to regulate the rights of parties under the contract.

“In extending the principles of *comitas* thus far, we have acted upon more liberal and more enlightened principles of international law, than prevailed at a not very distant period. For, in a case decided in the year 1779, (a) the Court refused to sustain a claim for six per cent. interest on a contract entered into abroad, where this was the usual rate of interest, and restricted the claim to five per cent., the legal rate among ourselves. In an older case, Savage against Dunn, (b) a claim for 10 per cent. had been restricted in a similar manner.

“In questions, too, regarding the dissolution of obligations by prescription, we do not in every case insist upon applying our own prescriptions, when there happens to be a collision betwixt them, and those of England. In the case of Delvalle against the Creditors of the York Buildings Company, decided in the year 1786, it was finally determined that the Scotch prescriptions could not be pleaded against English bonds;—and in the case of Cheswells and others against the same Company, which occurred several years afterwards, Feb. 14, 1792, it was again decided in conformity with this, by a great majority of the Court.

“If the contract now before us, therefore, was an ordinary case of civil contract, it would not be a matter of difficulty to determine, what effect should be given to it; but it is a contract of marriage which, in several respects, materially differs.

“Ordinary contracts, as they relate to matters of pecuniary and patrimonial interest, are left, in a great measure, to be regulated by the private parties themselves, and subjected to the free and legitimate opera-

(a) Wood v. Grangers, Jan. 24, 1779. (b) Savage v. Dunn, Jan. 25, 1710.

tion of their will, both as to the stipulations, and as to the period of their endurance. The one contracting party cannot, indeed, be suffered to free himself from the contract, without the consent of the other, or deprive the other of any rights, he may have acquired under it. He must be justly held to be bound by his own voluntary act and deed, as it not only depended upon his own choice, whether he should enter into the contract at first, but whether the particular stipulations so come under by him, should ever have formed any part of it at all. No alteration can therefore be permitted upon the terms of the contract at the instance of either party; but if both the parties to it shall so incline, they may at any time put an end to the contract altogether.

“The case of a marriage-contract is in these respects essentially different; while with ordinary contracts it has its origin in the will of the parties, who may enter into it, or not, as they choose; the rights and duties flowing from it, as well as its endurance, does not, like them, depend at all upon their pleasure. The relation of marriage is a contract *juris gentium*, affecting the personal *status* of parties, and is received in different countries under different modifications.

“I shall first inquire what effect our law would give to a *status* imposed by the law of a foreign country, where no contract of parties, as in the present case, intervened. As there are few or no decisions to be found either expressly on this point, or immediately connected with it, it is therefore necessary to have recourse to the general principles of our law, and to the opinions of the Civilians, whose authority our law is accustomed to respect, as the great fountain of the international law of Europe.

“The right to regulate every thing regarding the *status* of its subjects is assumed by the supreme power in every state, as inherent in itself—being connected with its most essential interests. It is vested there, as forming part of the *jus publicum*, which attaches to all the real subjects of the state, independently altogether of their will. The *status* of majority, minority, and the like, is imposed by a state on all those truly subjected to it, without any act on their part indicating their consent. When they happen to go beyond the boundaries of the state, by which any such *status* is imposed, into the territory of another state, where the law regulating personal *status* is different, the law, or supreme will of the state in the country into which they enter, does not, it will be observed, stand in any degree opposed, as in the case formerly alluded to of an ordinary contract, to what was fixed by the will of the individuals themselves, but stands opposed to the supreme will alone of the state, by whom the *status* was attached.

“Now, in such a case, a state does not think herself entitled to arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject. A foreigner is not obliged like a subject to have his *status*, or personal quality and interests, tried by the law of a country to which he never intended to submit himself, and of which he is not a proper subject.

[Vattel, p. 174, 175.] “The citizen or subject of a state who absents himself for a time, without any intention to abandon the society of which he is a member, does not lose his privilege by his absence; he preserves his rights, and remains bound by the same obligations. Being received in a foreign country, in virtue of the natural society, the communication and commerce, which nations are obliged to cultivate with each other,

he ought to be considered there, as a *member of his own country, and treated as such*. Remaining a citizen of his own country, he is still bound by those laws which permanently affect the character of a citizen, wherever he happens to be; and the laws of this kind, made in the country where he resides at the time, are not obligatory with respect to him."

"Nor is it any thing against this, that the will of individuals has no power or control over what relates to the regulation of their personal *status*. Once a person has become a proper subject in any particular country, it is true that no private stipulation of his can be suffered to affect it,—according to the maxim, "*Pacta privata non derogant juri publico*." But the will of the parties must be taken into view when the question is, whether an individual is, or is not, a citizen of a particular country, and so subjected to its laws. He is justly held to be so, when there are acts upon his part, importing a decided resolution, of taking up a permanent residence, within the limits of their operation. When he does so, the law of the new domicil, in regard to *status*, attaches to him; and that of the former domicil, which had been hitherto respected in his person, ceases to regulate his personal rights, now that his connection with the sovereign power, by whom it had been originally imposed, is dissolved. All questions regarding these are henceforward to be judged of by the law of the country, whither he has come permanently to reside, and which had hitherto refrained from applying its own law to his *status*, since any interest it could feel in the regulation of it, from his being a temporary resident among its subjects, was trivial in comparison with the much deeper interest possessed in it by his own state—the laws of which, in a collision of the two, must, therefore, *ex comitate*, be allowed to prevail.

[Hertius, p. 175.] "*Quando lex in personam dirigitur, respiciendum est ad leges illius civitatis, quæ personam habet subjectam. Ratio hujus regulæ est, persona subditi est nemini alio subjecta, quam summo imperanti, cui se submisit. [p. 173.] Illud superfluum videtur monere, quia per se planum est, legem poni personæ ab eo, qui jus habet in personam. Status et qualitas personæ regitur a legibus loci, cui ipsa sese per domicilium subjecit, atque inde etiam fit, ut quis major hic, alibi mutato scilicet domicilio, incipiat fieri minor.*"

"By domicil he understands, [p. 177] "*Ubi quis frequentius ac diutius commorari solet, rerumque ac fortunarum suarum majorem partem constituit. Inde fit ut leges quæ personæ qualitatem sive characterem imprimunt, comitari personam soleant ubique locorum versetur, tametsi in aliam civitatem migraverit, (veluti si quis major, Infamis vel prodigus declaratur.) Quando quidem extra illa civitas in advenam non habet potestatem, nisi ratione actuum vel bonorum immobilium; in reliquis iste patriæ suæ manet subjectus.*"

"Another author, Argentæus, [p. 74] thus expresses himself: "*Quotiescunque de inhabilitate personarum quæritur, toties domicilii et statuta spectanda.*"

"There are certain classes of questions alluded to by Hertius, as above, to which the principle of *comitas* is not extended, namely, all questions regarding immoveable property, which must be regulated by the law of the state where it is situate, and those regarding what he terms the *actus* of foreigners, by which must be understood, first their contracts, and next all cases of a criminal nature, when prose-

outed as crimes *ad vindictam publicam*. With regard to these last, a foreigner is allowed access into a country, only on the implied condition, that he be subject to the general laws, made to maintain good order and the public peace; and if he violate these, he is liable to be punished, according to the laws of the country, in the same manner as the real subjects of it. By disturbing the public peace, he is guilty of a crime against the society among whom he is come to reside, although it be only for a time; and the laws can make no distinction betwixt his case and that of a native subject.

“ I agree in so far, therefore, with what is maintained in the condescendence for the pursuer in this case, that it is the domicil of parties that regulates their ordinary *status*. But then the pursuer understands by domicil here, the ordinary domicil constituted by a residence of 40 days within the territory, whereas I understand the real domicil.

“ It must be here observed, that questions of *status* differ materially from cases of ordinary civil debt.—What is sufficient to constitute a *forum* in cases of debt, would give no jurisdiction at all in a *questio status*; as, for instance, in the case of the effects of a foreigner being attached by arrestment *jurisdictionis fundandæ causa*; and even in cases where a defender is personally cited within the territory, it seems absolutely necessary, on the same principle, to make a distinction betwixt the two totally distinct, and separate classes of actions. The foreign state has comparatively little interest to oppose, that one of her subjects should be sued and subjected to have the law of another country, where he may have happened to reside for 40 days, though not a permanent resider, applied to him, in an action for payment of his lawful debts. But she has a most material interest to oppose, that a short absence from his own country should operate a total change in his essential personal rights, in which she is chiefly concerned, and return him to her with his *status* totally altered from what it was, and set at complete variance with the law of his permanent residence.

“ Although, in other respects, the two cases may not be analogous, I apprehend that the same kind of domicil that is required to be ascertained, in a question of intestate moveable succession, is the domicil that is required in a question of ordinary *status*. The point to be investigated in the one case, is the real domicil of the individual at the period of death; in the other, at the period, when the question involving the consideration of the *status* of the party, happens to be tried. Had the defender in the present case happened to die, after coming to this country, his moveable succession could never, I apprehend, be held to be regulated by our law, but by that of England, as being the law of his proper domicil. I must not be understood to say, that because the personal succession of the defender would be regulated by the law of England, therefore, on the same principles, all questions regarding his personal rights, and the redress of wrongs relative to them, ought to be regulated by the same law. My reference at all to the case of moveable succession, is merely to point out and explain the nature of the domicil I would require in the case of the defender, as contrasted with the very slight and transient kind of domicil he actually possesses, and which, in a question of this grave and serious nature, I regard as no domicil at all. But I by no means intend to argue from what takes place in the case of succession, to the case of marriage. The cases are by no means analogous, as I have already mentioned, not being both

equally subjected to the will of parties; and the principles and rules which regulate each, are therefore not precisely the same.

“If it is asked, what are the rules by which it is to be ascertained whether or not a person has a fixed residence in a particular country? I answer, that no precise rules can be previously laid down respecting it. No doubt, on the one hand, a person removing with his family and establishment into another country, the transferring of his funds there, the purchase of landed property, or the like, are all circumstances entitled to the greatest weight in every such investigation. On the other hand, a person’s coming to this country alone, living in lodgings for a few weeks, while his family and establishment and funds remained in England, would seem quite insufficient to support the slightest belief, or supposition, of any fixed or permanent residence being in contemplation. But the matter, after all, will depend on the circumstances of each particular case, which must be estimated by the exercise of due discrimination, when it occurs.

“According to Voet, one of the most enlightened and judicious commentators on the civil law,—(a) “*Quoties autem, non certo constat, ubi quis domicilium constitutum habeat; et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, etsi non omnes æque firmæ, aut singulæ solæ consideratæ, non æque urgentes sint. Sic enim in dubio, in loco originis et domicilio paterno, quemque præsumi continuasse domicilium, jam ante dictum.*”

“By the Roman law, it was fixed that the residence of students at an university was not held to constitute a domicil, unless they continued there for a period of ten years. (b) “*Nec ipsi qui studiorum causâ aliquo loco morantur, domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes ibi constituerint.*” And, in the same title, which likewise treats, “*De Incolis et ubi quis domicilium habere videtur,*” it is laid down, “*Est verum, eos qui in territorio alicujus civitatis commorantur, velut Incolas ad subeunda munera, vel ad capiendos honores non adstringi. Cum neque originales, neque Incolas vos esse memoratis; ob solam domûs vel possessionis causam, publici juris auctoritas muneribus subjugari vos non sinet.*”

“The definition of *Incola* is given elsewhere. “*Incola est, qui aliqua regione domicilium suum contulit. Nec tamen hi qui in oppido morantur incolæ sunt, sed etiam qui alicujus oppidi finibus ita agrum habent, ut in eum se, quasi in aliquam sedem, recipiant.*”(c)

“*Domicilii quoque intuitu conveniri quisque potest in eo scilicet loco, in quo Larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est; peregrinari videtur.*”(d).

“It is quite impossible, I conceive, for a moment to maintain, that the defender’s domicil is of this description; and, consequently, whatever might take place in an ordinary action of debt, he cannot, I apprehend, be properly convened in an action of divorce. If there were nothing more in it than a question of ordinary *status*, which is the point of view most favourable for the pursuer’s object, I hold that the domicil of the defender is of too slight a kind, to entitle us to take cognizance of such a question as the present, involving the determination of his per-

(a) Voet, lib. v. tit. 1. sect. 97.

(b) Lib. x. Codicis, tit. 39, Leg. 2, 3, 4.

(c) Lib. i. tit. 16. Reg. 239. sect. 2.

(d) Voet, lib. v. tit. 1. sect. 92.

sonal rights, or to give us a proper jurisdiction in the case. Neither in the sense of the Roman law, nor in that of ours, can he be held to be truly an *Incola* of this country, or, in other words, as having a real domicil amongst us. England was the proper domicil of both parties at the time when the *status* of married persons was imposed on them; and I am completely satisfied, that England still continues to be so. “*Mutat unusquisque domicilium suo arbitrio, ad id, ut jurisdictioni desinat in posterum subjectus esse. Non tamen in dubio præsumenda facile domicilii mutatio, sic ut eam allegans, tanquam rem facti, probare teneatur.*”(a)

“Nor can it be held, that the consent of parties can supply any defect in regard to jurisdiction in the case of a *quæstio status* arising from the want of real domicil. For one essential requisite of prorogation is, that the Judge have such jurisdiction as may be a proper subject of prorogation. For this reason, there is no room for prorogation, where the jurisdiction is vacated, or its term expired, because no private consent can create jurisdiction.(b) Neither can jurisdiction be prorogated, in any case where the defender’s real domicil is not, as I hold to be the case here, within the limits of the Judge’s territory; any more than it would be in the power of parties to subject themselves to the jurisdiction of a Judge, while without the bounds of his territory himself.

“I might here stop,—as, if I am right in this position, I should be justified in dismissing the present action. But as this might imply it to be my opinion, that, in the event of the defender’s being possessed of a real domicil amongst us, so as to force us to sustain our jurisdiction, we should in that case be under the necessity of applying our own law, I shall proceed a step further. I am disposed to hold, that, upon the usual principles of international law, we should, even in that case, be prevented from giving what the pursuer demands from us; since she pursues for a complete change and alteration of the defender’s *status*, and consequently of her own, on grounds which would be insufficient so to alter it according to the law of England, the country where the marriage was contracted.

“By a court being compelled to sustain its own jurisdiction, and consequently bound to take cognizance of, and pronounce a judgment in, any particular case, it does not follow as an absolute consequence, that the law by which the judgment is to be regulated and determined, must necessarily be its own. Whether its own law is to be the rule of decision, or whether a court will in some cases allow effect to be given to the foreign law, by which the matter at issue may seem to have been previously fixed, may admit of considerable doubt, and will depend on a variety of considerations.

“On the supposition that a real domicil did actually exist here, I think a distinction is to be made betwixt a case of ordinary *status*, when the law of a state imposing it attaches to an individual without any act of his own, or any consent adhibited to it on his part, and that *status* which is imposed on two different individuals, as in the case of marriage, at one and the same time, and with a reference to one another—with their joint consent, and even at their express desire.

“In a collision of the laws of two different kingdoms regarding such a point, it then ceases to be merely a case where the supreme will of

(a) Voet, lib. v. tit. 1.  
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(b) Erskine, p. 35, sect. 29.

one state stands opposed to that of the other, as in ordinary *status*, but partakes so far of the nature, and resembles a case of ordinary contract. Both parties must be viewed as standing mutually pledged to one another, not to seek any alteration or infringement of the peculiar character which they both understood, or, what is the same thing, must be held to have understood, attached to the relation at the time of entering into it.

“In a case of ordinary *status*, I think the real domicil would regulate it; and so it would be liable to be altered by a change of domicil, according to Hertius, as above quoted. “Major hic alibi mutato domicilio inciperet fieri minor.” But the *status* of married persons cannot, I am disposed to think, be held liable to any similar alteration. Although the rights and duties flowing from the marriage relation are not matter of private stipulation, but of public law, yet once it is ascertained by what law the relation was regulated at the time, so as to receive from it a peculiar modification, I conceive that such modification must continue to characterize it ever afterwards; and must be held effectually secured against any future challenge at the instance of either of the parties. The law of another state, where the parties may afterwards become permanently resident, and where the marriage contract subsists under a different modification, when so called upon by either party, must, according to every just principle of international law, *ex comitate* refuse to apply its own peculiar modification, and must view both parties as barred *personali objectione*, in regard to one another, from making any such application.

“It could not be said, I conceive, in such a case, that a state, by refraining to apply its own rules, and by applying the rules of the foreign country where the relation was created, and thus permitting within its territories the exercise of powers of foreign courts, unknown to its own law and institutions, would thereby compromise the supremacy of its own law. It is admitted in every case, where the application of the principle of *comitas* is concerned, that when the admission of the foreign law would be clearly inconsistent with the essential policy and institutions of the country, where it is proposed to be received, this must create an effectual bar to the extension of the principle to such a case. But any argument that would carry the limitation of the principle farther than this, so as to refuse to sustain the foreign law, though not chargeable with any such consequences, would equally strike against the recognising the principle of *comitas* at all.

“Indeed it would appear that the pursuer goes this very length, when she expatiates on the grievous hardship that would result from a foreigner's being allowed to import his own law. But it is no longer a question whether the principle is to be admitted,—it has already been both recognised and applied in numerous instances; the doubt is merely as to the extension of the application, if it is in truth any extension of it at all. In every case where one state gives effect *ex comitate* to the law of another, it may be said, that, in that instance, the foreigner is allowed to import his own law.

“It has been argued, that the inhabitants of a country are subjected to a serious hardship, if a foreigner, who happens to come among them, is not held to have his rights and duties measured out by the same standard as theirs; and that they must run the greatest hazard, in either contracting with him, or having any intercourse with him at all. But it must be recollected, that the question as to a foreigner's right to ob-

tain a divorce, is one which concerns the married parties themselves, not the inhabitants among whom they have come to reside. If it was a matter, in which they had acquired any title or interest, or by which, in the event of effect being given to the foreign law, they would be either individually or generally affected, this would completely alter the case, and would bring it under the limitation of the principle formerly stated, of the extension of the *comitas* being inconsistent with the interests of the state, before whose courts the question came to be tried.

“According to Huber, vol. ii. lib. i. tit. 3. sect. 11, “*Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur præjudicium in jure sibi quæsito.* Exemplum: In Hollandia contractum est matrimonium cum pacto, *ne uxor teneatur ex ære alieno, a viro solo contracto.* Hoc etsi privatim contractum valere dicitur in Hollandia; in Frisia id genus pacta non valent. Vir in Frisia contrahit aes alienum, uxor pro parte dimidia convenitur; opponit pactum dotale suum; creditores replicant, *Jure Frisiae non esse locum huic pacto, quia non est publicatum; et hoc prevalet.*” There is here, besides, in fact, a new contract entered into betwixt the foreigners and the natives of the country, and it is the law of the place of the new contract that falls to be applied.

“In the report of Delvalle against the Creditors of the York Buildings Company, formerly referred to, it was pleaded on behalf of the creditors, against allowing the foreign law, that “proceedings in courts of justice must ever be governed by those rules, which have been established by the power from whence the Judges derive their authority, which *alone* they are bound to know, and to which every party, who commences a suit before them, must be understood to submit the trial of his claim. One restriction only of this general principle occurs, with regard to the solemnities of contracts. In order to preserve an equal intercourse between the individuals of different nations, it has been determined in Scotland, as well as in all other civilized states, that the want of those forms which are required in the country, where execution is demanded, shall not render invalid an agreement, which would have been effectual in the country where it was entered into.

“But in every other question, either with respect to the efficacy or the extent of covenants, exercised in a *foreign country*, the law of Scotland has been in our Courts invariably followed. Thus, where a bond has been granted in Ireland, containing an obligation to pay interest at the rate of 10 per cent. as allowed in that kingdom, our Judges gave decret only for those sums, which could have been legally stipulated, for the use of the money in Scotland.

“The Scottish constitutions, in particular, which limit the endurance of actions, have been uniformly extended to claims, founded on contracts executed in foreign countries. It is of no consequence that, in this manner, the effect of contracts will be different in different countries. This must unavoidably happen, unless all nations were to agree on one common system of jurisprudence. Till that period arrives, it is enough, that deeds executed in a foreign kingdom are in Scotland sustained in the same manner, as those of the like nature framed according to the rules prescribed in this country.

“I quote this, because it appears to me to contain the very arguments, which I observe have been generally brought to oppose the giving effect to the foreign law, as to marriage; and as those arguments were completely unsuccessful towards maintaining the plea, for the support of

which they were brought, the decision which followed may be referred to, as proceeding on the same general grounds on which the present case will fall to be determined, and so completely justifying from analogy the application to it, of the principle of *comitas*. The question of interest, too, founded on in the above argument as in favour of it, has since received, as already mentioned, a different decision by our courts; and this of itself serves, besides, to overturn completely one of the pursuer's positions, where he lays it down very broadly, that a contract, which it is unlawful to make in this country, cannot be carried into execution here, though entered into elsewhere.

“Even after nations have been led to recognise the principle of *comitas*, it is only gradually that they become willing to carry it to its due extent; a natural jealousy of encroachments by their neighbours, on their own municipal institutions, renders their progress extremely slow, towards attaining liberal and enlightened views in the application of international law. But the same reasons which induce one country to receive a marriage-contract as valid in the other, at all, though the forms requisite to its validity there, are such as are wholly unknown to itself, and perhaps even regarded by it with dislike and disapprobation, must induce it to receive it with all its properties and effects, so far as they do not call for the usual limitation, by which the reception of any foreign contract must always be understood to be qualified. (a) “*Porro non tantum ipsi contractus ipsæque nuptiæ certis locis rite celebratæ, ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt.*”

“It must be remembered, too, that marriage is a contract altogether of a peculiar kind—that it stands alone, and can be assimilated to no other contract whatever. Every argument in favour of a state's giving effect to ordinary contracts entered into abroad, apply with infinitely greater force to marriage, from the additional character of solemnity which is superadded to the engagements which parties come under to one another.

“Marriage, in its origin, says a most eminent and enlightened Judge, in determining a late case, (b) “is a contract of natural law. It is the parent, not the child, of civil society. In civil society, it becomes a civil contract regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has the sanction of religion superadded—it then becomes a religious and civil contract; for it is a great mistake to suppose, that because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract; and the consent of the individuals pledged to each other is ratified and confirmed by a vow to God.”

“The law of Scotland does not by any means regard marriage as it is sometimes supposed to do, merely as a civil contract, the creature of civil society. It regards it as antecedent to all civil society whatever, and founded in the divine institution. “The first obligations,” (c) says Lord Stair, “put upon man by God, were the conjugal obligations, which arose from the constitution of marriage. Though marriage seems to be a voluntary contract by engagement, because the application of it

(a) Huber de Conflictu Legum, Vol. II. l. i. tit. 3.

(b) See Dodson's Report of the case Gordon against Dalrymple.

(c) Stair, Book i. tit. 4.

is, and ought to be, of the most free consent, and because, in matters circumstantial, it is voluntary, yet marriage itself, and the obligations thence arising, are *jure divino*. Obligations arising from voluntary engagements, take their rule and substance from the will of man, and may be framed and composed at his pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial, as to make the marriage for a time, and so of the rest, which evidently demonstrateth that it is not a human but a divine contract." Lord Bankton, in his observations on the rule of law, *nuptias non concubitus sed consensus facit*, says, (a) "The law before us being from Ulpian, a Gentile lawyer, who did not own marriage to be a divine contract, must hold more strongly in Christian states who regard it as such; and particularly with us, marriage is esteemed a divine contract." (b)

"The public solemnity is by the law of Scotland, only matter of order, and not essential to marriage; but as the sanctions of religion are superadded, to the natural force of the otherwise binding engagements of parties to one another, a state will, from views of general expediency, be still more unwilling, to allow of any infringement being made on them, than it would even be, in ordinary cases of a purely civil nature. Any interest that it can have, in imposing the same character on this relation, in the case of all its subjects, even of such as have become only truly such, subsequently to their entering into it, cannot compare with that higher interest which it possesses in common with all other civilized states, that the sacred engagements of parties, reciprocally come under to one another, and which engagements must be held to have a reference to the nature and character of the relation as subsisting at the period of its being contracted, should, along with the relation itself, be suffered to remain without any change whatever being permitted on either.

"But it may still remain a matter of difficulty to decide, what shall be the rule for fixing the character of the marriage relation in those cases, where the real domicil of the parties at the period of contracting happens to be different from the *locus contractus*. For example, in the case of a marriage contract entered into in England by Scotch parties, not having any permanent residence there, is such to be regarded as an English or Scotch marriage?

"According to the authority of some of the Civilians, such a marriage would be reckoned to be Scotch, if the parties had it in view to live as married persons in this country. Huber, in his *Treatise de Conflictu Legum*, sect. 10, thus states his opinion: "Verum tamen non ita precise respiciendus est locus, in quo contractus est initus, ut si partes, alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti, non tam is est ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt, ut omni die fit homines in Frizia, Indigenas aut Incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt. Jus Friziæ in hoc casu est jus loci contractus."

"Another writer, Voet, the father of the writer formerly quoted, in his *Treatise de Statutis Eorumque Concursu*, is of the same opinion. (c) "Verum principio inquirendum de pacto seu contractu nuptialia, an

(a) Tit. xiv. b. 4.

(b) Lib. i. tit. 5.

(c) Cap. 2. p. 319. § 5, 9.

si forensis matrimonium ineat, cum virgine non suæ civitatis, contrahere censeatur secundum suæ patriæ statuta an domicilii virginis? Respondeo quia mulier quæ matrimonii legis consensit, judicatur respicisse domicilium mariti in quo deducenda est, et non simpliciter dicitur quis esse in loco, in quo corporaliter consistit, sed in quem fertur animi destinatione, quomodo et domicilium mutare dicitur: potius secundum illius domicilii leges censebitur contraxisse, quam secundum leges loci, ubi ipsi vere jungitur, et domicilium habet. Nisi tamen maritus in domicilio uxoris contrahat animo ibidem commorandi, quo casu forte pro naturali cive censendus.”

“A contrary opinion from this is, however, maintained by other Civilians; and further, the maxim of law to which the opinion of Voet appears, in some degree, to have a reference, and by which it appears, in some measure, to be influenced, *Sponsa Contractis Nuptiis domicilium Mariti sequitur*, does not apply in any question which regards the period of the actual solemnizing of the marriage contract itself. It is only subsequent to the marriage that the maxim applies; at the time of contracting, she retains, as before, her own domicil, according to the law,—“*Ea que disponsa est, ante contractus nuptias, suam non mutat domicilium.*”(a)

“But, independently of this, I apprehend the juster view to be taken of the point is, that a matter of such high importance as this, cannot be left at all to the will of the parties to determine; and, therefore, any inquiry as to their presumed will, or intention, must be a matter of indifference, where the most anxious expression of it on their part, could be of no possible avail. The rule of law, “*Juri publico pacta privata non derogant*,” applies here. The parties to a marriage-contract, although they are at the time the subjects of another state, with whose *status* the state into whose territory they have entered will not be willing to interfere, while merely temporary residents; yet, if they proceed to make it the scene of a contract of marriage, they will be held, in the eye of the law of that country, and according to the acknowledged rules of law everywhere, as bound to abide by the character of the marriage subsisting there; and this, whether capable of entering into the contract by the law of their own country or not. They have no cause to complain, as both the time and place for entering into the contract are dependent on their own choice. It is true, that, by entering into a marriage-contract, they do not bind themselves to reside always in the country where it is entered into; which supposition, it is somewhere alleged, would follow as an absurd consequence, of our refusing to apply our own law. Parties may change their domicil, as often as they please; but the law of any future residence, while it will regulate their future acts, will never, on any sound principle of international law, lend its aid to assist parties in shaking themselves loose of their former acts or contracts, binding them, long previous to its connection with them. According to Hertius, “*Ratione actuum subjiciuntur cujusque generis personæ, etiamsi advenæ, sive exteri, vel transeuntes, vel negotiorum suorum causâ ad tempus in civitate commorantes, quatenus nimirum ibi agunt, id est, si contrahunt vel delinquant.* Nimirum valet hæc regula, etiamsi in extero qui actum celebrat, licet enim hic subjectus manet patriæ suæ, tamen illud, ut supra diximus, de *actu primo* est intelligendum, *quoad actum vero secun-*

(a) Lib. 50. Pand. tit. i. leg. 32.

*dum, subditus illius loci fit temporarius ubi agit vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur.* Extenditur ad consequentia sive profluentia ex actu illic principali." If the character so attaching is not received along with the relation itself, by their own country on their return, it must be in consequence not of a power to effect this, by any will either express or presumed of their own, but in consequence of the claims their own state has in regard to them, as her subjects.

"It is a matter of arrangement betwixt the two states, not betwixt the parties. But their own state, while it will not, I apprehend, suffer any infringement on the character of this relation, where the parties have only subsequently to it, become her subjects, will feel herself equally bound to act in a similar manner, when the parties happened to be her own subjects at the time. By a state's admitting in this way of such a modification of the relation as is wholly unknown to her, she may, indeed, at first sight, have the appearance of yielding too important a point, as that the *status* of her own subjects should be regulated by a foreign power. But this point she in fact has already yielded, in consenting to receive the contract imposing the *status* of married persons on the parties. In admitting this, her law actually bends in so far, to the dictates of a foreign law, which it has been held out as a thing quite impossible for any state to consent to, and a point of degradation to which no state could possibly stoop, in regard to the *jus publicum* of another. It is not sufficient, in order to evade this, to say, that in admitting the relation of marriage itself, she admits merely what is a contract *juris gentium*, and not a contract peculiar to the foreign state, and to which she herself was a stranger. She does a great deal more—she admits and sanctions the forms and mode of the constitution of the contract, which is not *juris gentium*, but purely of the municipal law or *jus publicum* of the other state; and a mode of constituting the relation, in many cases viewed by her with positive abhorrence, and diametrically opposed, and repugnant to the whole genius and system of her own regulations on that head. The English Courts, in agreeing to sustain the validity of a Gretna Green marriage, or indeed the majority of Scottish marriages, which it must be admitted are often of so loose and singular a nature, as to render it frequently a matter of difficulty for our own Courts to determine, whether there has been a marriage or not, actually sustains, what, if such a mode of constituting the relation had been attempted, on any part of her own territory, would have been completely disregarded by her, as constituting no marriage at all betwixt the parties—who, under its sacred name, were merely living in a state of concubinage. I shall be told that a state consents to overlook this, and sustains the forms recognised by the foreign law as sufficient, on the ground of expediency, and to prevent greater evils, which would result from her refusal to do so; and this I view as precisely the ground why a state, having actually advanced this one step, and most important one, in the way of concession to a foreign power, and by which she effectually abandons the principle of refusing to bend to the will of a foreign state, is bound, on every principle of consistency, to advance one step further, and consent to receive the modification of the relation along with the relation itself. She bends to the public law of the other state, in what relates to the *mode* of forming the relation, which, it must always be remembered, is quite a distinct and separate thing from agreeing to receive the relation itself as a con-

*tract juris gentium*. Her merely agreeing to yield this last point, might justly be held to imply, that such forms had been observed in regard to its constitution, as in her eye actually to constitute it, otherwise she might fairly hold it not to have any existence. Now, why a state should stop short here, and along with the mode not receive the modification of the relation, remains to be explained.

“A state will therefore, on every principle of sound policy, view it as essential to its own interests, that every thing regarding marriage, should be fixed and determined in the same manner, as in deeds subjected to the will of parties, by the ordinary rule of the law of the *locus contractus*. For there is no other mode of fixing the character of a marriage in a clear and certain manner. If any other rule were resorted to, marriages, in appearance the most similar in their nature and attending circumstances, would be found on investigation to possess different characters, according to the result of the proof, to which every individual case, with a view to ascertain the real domicile at the time of the marriage, would necessarily be subjected. Nothing can be conceived more injurious either to the individuals themselves, or to the different states respectively interested in them, than the doubt and uncertainty which in this way would be created—or more directly repugnant to all the valuable and important purposes, for which the marriage relation was at first instituted.

“According to Lord Bankton, (b. i. tit. 1.) “For expediency, it is everywhere received as the law of nations, and particularly obtains with us, that deeds granted abroad, conform to the law of the place where they are dated, are sustained, because the obligation, being once effectual, must remain so; and it were absurd that the *debtor's changing his residence should free him of his obligation*.” “It is just that *the obligation should be dissolved by the rules of the same law whereby it is constituted*.” This rule, although strictly applicable only to those deeds or contracts which are subjected to the private will of parties, is the only safe rule to which a state can possibly resort, even in regard to marriage—the nature of which, I admit, is so far materially different, as not being, properly speaking, under the private party's control.

“An argument is attempted to be founded, against the law of the *locus contractus* in the case of marriage, in favour of that of the domicile, from what takes place in regard to the division of the goods in communion, upon the death of one of the married parties, and where there is no written contract. It is argued, that as it is the law of the domicile at the period of death, which in such a case regulates the disposal of the property, the same law must necessarily regulate every other question regarding the *status* of the married pair; and that the law of the domicile would have equally regulated, although a written contract had actually existed. But this I apprehend is a complete mistake. It is not from its being viewed as a matter arising from the marriage at all, that the law of the domicile steps in, and regulates the disposal of the effects, but as a matter arising from the death, and so to be regulated by the ordinary rules of succession, which are framed on quite different principles. In the cases referred to there was no previous contract, containing express stipulations as to the will of the parties, which would have superseded any necessity for the law of the domicile interfering. And this is a sufficient answer to all the arguments

founded on the case of the *repetitio dotis*, where no contract happens to intervene, and where the law of the country, where the husband dies, is different from that in which the marriage was contracted.

“The whole question is entirely one of expediency; and this is clearly in favour of any sacrifice of the kind on the part of the law of the state where the question is tried. Expediency calls here for a suspension of the common rules by which the ordinary *status* of parties is regulated, namely, the law of the domicil, in a case of a nature so peculiar and distinct from every other, as that of marriage,—to which there is nothing “*aut simile aut secundum*.” The disadvantages, if any, of such an application of the principle of *comitas* are equally balanced. What may be sacrificed on the part of one state at one time, is compensated by a corresponding sacrifice made to her at another; the concessions are reciprocal, and in every point of view ultimately for the general advantage of both.

“But the consequences that would necessarily flow from such an exercise of the principle of *comitas* are represented as alarming in the extreme,—that the whole order of society would be confounded, and foreigners, on this principle, would be so many privileged classes, living under separate laws, on the territory of any state, within whose limits they may have come to reside.

“But, if a state’s receiving a peculiar modification of the marriage relation will lead to such alarming consequences, these must equally result from a state’s receiving the relation at all, when attempted to be constituted in a different manner, from that with which she is acquainted, and under forms which she regards as utterly incapable of constituting it; for, in doing so, she actually goes the length of sanctioning and approving, what she must at the same time regard as nothing better than a species of privileged adultery; an expression employed by the pursuer, though by no means in so legitimate a sense, in a reference to the right of divorce; for such would be the light in which a state would actually regard the connection in the case of her own subjects.

“Any apprehensions of this kind, however, appear to me to proceed on a misconception, as to the real extent to which the legitimate application of the principle would be in any danger of leading. The application must be confined entirely to the civil effects of acts committed by foreigners, as operating on a contract entered into by them, previous to their taking up their residence, within the limits of another country, and the effects of which did not extend beyond themselves, so as to affect any of the mass of the population, among whom they now dwell, either individually, or as touching their essential moral interests. All contracts entered into by foreigners subsequent to their removal into the other country, are to be determined entirely by the law of that country; and this even though incapable, from being minors, for instance, or the like, from contracting in such a manner, according to the law of their former residence. Those very same acts, too, the effect of which, when viewed only in a civil light, and as limited to themselves, is, as I hold, to be regulated by the foreign law, if prosecuted in the light of crimes, would infallibly subject to the pains and penalties of the criminal code. So that in the event of effect being given in this limited class of cases, to the operation of the foreign law, there is no room for alleging, that a necessity would exist, for a nation conferring new powers and forms on its courts of justice, with the view of enforcing on foreigners, in every

case, the laws of their own country, after they had abandoned it. This would be a straining of the application of the principle beyond all bounds, and overlooking entirely the marked line all along drawn and insisted on, which separates subsequent contracts from previous ones; civil acts, or acts viewed and prosecuted only to a civil effect, from criminal ones; and acts limited and confined to the parties themselves, and having reference only to them, in respect to each other, from those in which the subjects of the new state come to be interested and connected. If all these different cases are blended together, and no distinction be allowed to exist betwixt them, then it may be said, that the same principles which prescribe to nations the administration of their own criminal law, appear to require a like exclusive administration of the law, relative to the domestic relations. In a case of a criminal nature, robbery for instance, perpetrated by one foreigner on another, it is not a matter which concerns the injured party merely, though he is the immediate and direct object of the attack, but the community at large. It is the interest of the public, that others should be deterred, by means of the punishment of the offender, from a similar commission of the crime. If the privileges conferred by our law on the injured party, of prosecuting a divorce, were intended, in like manner, *in terrorem* of the commission of adultery, and to deter from the breach of matrimonial engagements, then the same reasoning might, with some degree of plausibility, be applied to both. But this I doubt extremely; and our law, if it ever had this object in view, has unquestionably completely missed her aim. While the prospect of obtaining a divorce may, in many cases, have been the very inducement to the crime, I am fully persuaded we are by no means indebted for the degree of purity still maintained amongst us, in regard to the marriage relation, to the privilege competent to the injured party, of pursuing a divorce. If we are indebted to any thing beyond the far more to be relied on security, arising from the moral and religious principles of our people, it is to the terrors of the criminal code; and to its penalties, if still in force, the present defender is equally liable, with any individual of our own country.

“No person can doubt that adultery is a crime of a most flagrant nature, involving, too, that of perjury, in addition to its otherwise heinous guilt; and so, in every point of view, a gross violation of the laws both of God and man. It is equally true, that the criminal code of a nation attaches to a person found within its territories, whether foreigner or native, or whatever the nature of his residence may be. No *comitas* can be extended here, so as to supersede or suspend the exclusive operation of our own law. But then the cognizance of acts such as those now libelled on, in the light of crimes, is peculiar to the criminal tribunals. Our Court is purely civil, and possessed merely of a civil jurisdiction. It is as to the civil consequences only of the act of adultery, founded on for the purpose of obtaining a sentence of divorce, that we are called upon to judge,—whether the act shall be held to produce here an effect on a marriage-contract, entered into in another country, different from what it would be held to do there. As far as this is concerned, the allegation of the fact of adultery must stand on the same footing, as an allegation of desertion and non-adherence, if founded on as warranting a conclusion of divorce; and this takes away the foundation of all the arguments drawn from the case of Turkish marriages, or any other, where the powers attempted to be exercised by the foreign husband,

though warranted by the law of his own country, are held to be either criminal or *contra bonos mores* by that of ours.

“Such, for instance, is the case of a Mahomedan attempting to marry two or more wives in this country,—a right to exercise domestic slavery,—and innumerable other cases which have been figured, all such, being either of an immoral tendency, or of a criminal nature—repugnant to, and subversive of, the interests of morality amongst us, must at once be perceived to fall under the limitation, formerly stated, to every extension of the principle of *comitas*. The alleged impunity, therefore, of all kinds of crimes, when committed by foreigners, which, it has repeatedly been urged with apparent seriousness, could be justified on the same principle that would refuse to the pursuer the right of divorce, proceeds, on what appears to me, a complete misconception as to the nature and character of the act, in so far as this Court is entitled to consider it.

“What I hold to be decisive on this point, so as to supersede the necessity of any other argument—it is expressly laid down by the Civilians, that the action of divorce is purely of a civil nature, and has no connection whatever with the criminal action, arising from the act of adultery.

“(a) *Posito autem adulterio insonti conjugii permissum non est, matrimonii vinculum privatâ dirimere auctoritate, sed actione civili ad nuptiarum dissolutionem contendendum est, ut probatis probandis, Judex ipse suâ sententiâ decernat nexûs conjugalis separationem.*”

“(b) *Quod si et vir et uxor adulterium perpetraverint, in criminali quidem pœnæ persecutione, mutui criminis compensatio est, sed utrique supplicium ex lege imponendum; quantum tamen ad civilem actionem attinet, quo etiam referenda hæc matrimonii separatio, magis est, ut par crimen mutuâ inter conjuges pensatione tollatur; dum per iniquum, virum ab uxore pudicitiam exigere, quam ipse non exhibeat. Quibus vero pœnis aliis tum pecuniariis, tum corporalibus adulteria puniantur ex Titulo ad Legem Juliam de adulteriis descendum erit.*

“(c) *Moribus Hodiernis adulterii accusatio, quantum ad vindictam publicam solis competit illis, qui ad accusandos etiam aliorum criminum reos publice constituti sunt, salvo UXORI VEL MARITO INNOCENTI JURE PETENDI MATRIMONII DISSOLUTIONEM.*”

“From this it is evident, that the right of divorce, while it is entirely of a civil nature, is competent only to the married pair themselves, and can neither be transferred by them to another, or interfered with by any third parties, whether private individuals, or such as are officially vested with the right of prosecution, in matters connected with the criminal department. The right of divorce must be regarded in the light of a personal privilege, and so regulated by the general rule of law as to them. (d) “*Personalia autem sunt non ea tantum, quæ uni certæ personæ data, sed et quæ toti certarum personarum generi, generali lege concessa. Quæcunque autem privilegia sunt personalia, illa nec cessione juris aut actionis in aliam possunt personam transferri; cum eâ ratione personam egrederentur, contra concedentis intentionem.*”

“Neither can the acts of adultery here libelled on, while in this way not falling under the general rule regarding crimes, on the other hand, be held to partake of the nature or effects, of the other class of *actus*

(a) Voet. Lib. xxiv. tit. 2. sect. 8.

(b) Sect. 6.

(c) Lib. xlviii. tit. 5. sect. 21.

(d) Voet, Lib. i. tit. 4. sect. 12, 13.

mentioned by the Civilians, that of contracts, in consequence of any imaginary *quasi contract* of the offender *cum pœna*, as laid down by some writers, and so subjected to the rule applicable to them. The only contract in the case, is the marriage contract subsisting between the parties; and from which alone, and not from the act of adultery itself, the right of the injured party to avail herself of it, for the purpose of obtaining a dissolution of the relation, certainly springs. Whether such a right is competent, will depend on what must be understood to have been previously fixed, by the law of the place of the contract, determining all the effects *consequentia et profluentia ex actu illo principali*, as expressed by the Civilians.

“I admit, that if it could be made out, that a refusal on our part to sustain adultery committed here, when regarded merely in a civil light, as a relevant ground of divorce in every case, would be repugnant to the interests of morality among ourselves; this would compel us to sustain it.

“But as to this, it would not be sufficient to establish that the law of England was, in this point, inferior in expediency to our own, or even that it did not appear so conformable as ours, to the rules concerning it, contained in the infallible standard of our common religion, in which both countries admit the relation to be founded. The rules there laid down, while they appear to me clearly to warrant a state granting this permission to her subjects, must be admitted not to be delivered as binding and imperative on all states,—but merely permissive even as to them. To many states, there may appear to exist strong grounds, arising from the situation of their different populations, for inducing them to forbear exercising the permission there conceded to them. They may hold that the accustoming their subjects to view the marriage relation as indissoluble—as an inseparable conjunction of interests, till death—affords the only effectual means of ensuring persevering endeavours on both sides, to secure mutual harmony and fidelity. It would be necessary, therefore, to establish that there were circumstances of a peculiar nature in the situation of this country, which rendered the refraining to enforce our own law on this head in every case highly prejudicial, and to strike deep at the root of the interests of morality amongst ourselves. But I am satisfied, for my own part, that this is by no means so clear; and that, at all events, any pernicious effects on the one side are so fully counterbalanced by evils of a different kind on the other, that I see no call here for any suspension of the usual principles of international law.

“It must be recollected, too, that divorce is in reality a deviation from the original institution of marriage, which was intended to be perpetual. “The perpetuity of marriage,” says Lord Stair, “is evident, and the dissolution of it is only natural by death.”(a) Some writers, indeed, maintain that the act of adultery operates *ipso jure* a dissolution of the marriage; but it is certainly not so with us. “Adultery and desertion do not annul the marriage, but are just occasions upon which the persons injured may annul it, and be free; otherwise, if they please to continue, the marriage remains valid.” Parties may not only exercise the right of claiming a divorce or not as they please, but they may renounce it at any time subsequent to the act of adultery; and, without any renuncia-

(a) Stair, B. i. tit. 4.

tion, they may even be deprived of it by the operation of the law itself, in the event of grounds existing for presuming a *remissio injuriæ*; all which make it a case totally different from that of claiming a *status*. All these circumstances seem to invalidate the idea of the right possessing, in the eye of law, such an essential and vital importance, as calls imperatively on the courts of this country to enforce it, even in the cases of foreign parties, where an application to that effect happens to be made to them.

“This appears to me to do away the force of any argument that may be founded on the decision of the House of Peers, in the case of Campbell of Carrick. By that decision, it was found that no person can be barred or precluded from claiming personal *status*, by any previous renunciation of it. But, in the first place, our courts, in refusing a divorce, would not refuse it merely in consequence of any supposed previous renunciation of it by the parties, but because the law of the country, to which they were subjected at the time, did not admit of any such consequence or effect to follow upon it, in any event; or, as the Civilians express it, *profluere ex illo actu principali*. In the next place, and which is the most material point of distinction, a decision that a person could not be barred from claiming her *status* of marriage by any previous renunciation, would not determine the point, whether or not she could be barred either by her own act, or by the previous act of public law, from afterwards claiming her right to destroy it. The jealousy evinced by the decision in the case of Carrick, is not of previous renunciations, but of every thing destructive of the *status* of marriage; and, consequently, any weight attached to that decision in a question of the nature of the present, lies the other way, and would operate not in favour, but against the pursuer’s being allowed a divorce.

“It has been maintained, that we should not concede a point of this kind to England, as, in the case of Scotch marriages, the English courts would not afford the parties the remedy competent to them by the law of Scotland; and that, in this way, such a concession on our part would not be met by a reciprocal concession on theirs. But if the assertion as to this is really just, I do not consider an individual state’s refusal duly to apply the principle of *comitas*, as affording, on liberal or correct views, a sufficient ground for our refusing duly to exercise it on that account towards her. What an individual is, in relation to the state of which he is a member, individual states are in respect to the great republic of nations; and the maxims which ought to influence the private conduct of the former in their daily transactions, are somewhat analogous to those, which ought to regulate the general intercourse of the latter. The adjusting, in exact and nice proportion, the measure of liberality which we deal out to others, by what they appear disposed to evince in their turn towards us, is as little consistent with just and enlightened views, as it is with sound policy; and is as little calculated to bring others to a sense of what is justly due to us, in the one case, as it certainly would be in the other.

“Before concluding, and with reference to the effect which refusing divorce to parties in the situation of those now before us is likely to have on the moral interests of this country, I would only observe, that if it is henceforward to be held as a fixed point, that all foreigners, without distinction, are entitled to a divorce according to our law, we ought to recollect that there is another way, in which we shall ourselves be ac-

cessory to the contamination of the moral feelings of our people, by our actually inviting the profligacy which occasions it. In a question of expediency like the present, what I am now alluding to seems to possess considerable weight. As matters now stand, a temptation is presented to all the profligate of our sister kingdom, to the very commission of the crime. It is evident, that it is not the denial, but the granting of divorces, that will occasion that influx of unprincipled strangers mentioned in some of the papers given into Court by the pursuers, in the late cases of divorce. And I will venture to say, that there is no injury, as far as we ourselves are concerned, can result to us, from the denial of divorce to parties in the situation of those now before us, that can in any degree equal the shock which the public decency, and the moral feelings of this country, must infallibly sustain, by accustoming its inhabitants to the spectacle of this crime, under a new and unheard of aggravation. Among the cases which have of late years occurred, of divorces sued for in this Court, it is much to be feared, that they have witnessed this crime, the commission of which they had been hitherto led to consider as originating in the impulse of guilty passion, rise a step higher in the scale of moral depravity, and actually perpetrated with wilful, deliberate, and daring profligacy, for the express purpose of obtaining an object denied to the parties by the laws of their own country. This is to exhibit a specimen of depravity, so shameless and so utterly abandoned, as to admit of no adequate terms of reprobation; and, were the case at issue on this point alone, I think a court would do well to pause, before it pronounced a decision that could lead, even indirectly, to such alarming and revolting consequences.

“But, independently of this, I am in every point of view decided for refusing the divorce sought for by the pursuer. In the *first* place, I do not hold the defender to have such a real domicil in this country as to give this Court a proper jurisdiction over him, in a *quæstio status* of any kind; and, *secondly*, admitting that he had a real domicil amongst us, so as clearly to found our jurisdiction, and entitle us to take cognizance of, and decide in regard to the case, I am of opinion, the remedy we ought to give to the pursuer should be regulated, not by our own law, but that of England, the country where the marriage founded on was contracted,—this extension of the exercise of *comitas* towards the foreign law, being completely recognized by our own, in other cases of a nature clearly analogous, and loudly called for on every liberal and enlightened view of the principles of international jurisprudence.”(a)

(a) The Reporter has thought himself bound, in justice to his brethren, to give their opinions at full length, and in their own words, as printed by the order of the Superior Court, which follows. Although, in the course of his duty, while officiating during the vacation of the other Courts, he laid this particular case before them, and delivered an opinion for sustaining the law of the domicil, and finding the allegation of the pursuer as to the domicil of the defender in this country to be relevant, he has not conceived that it would be proper also to repeat here the views which he then stated; because, if these are of any value, they appear in a more mature shape in the subsequent discussions, as corrected by the information he derived from his colleagues at this stage. He then, indeed, laboured under an impression, that, while the law of the contract was rejected as the rule of decision, by the Superior Court of Scotland, the law of the real domicil was likewise rejected, not only by the Twelve Judges of England, but also by the Superior Court of Scotland; and that the latter held the establishment of jurisdiction to be a sufficient ground for giving divorce *a vinculo matrimonii*, on account

A bill of advocacy was presented for review of this judgment, upon which Lord Meadowbank, Ordinary, [14th July 1814] pronounced the following interlocutor of remit:—"Having considered this bill and the proceedings, refuses the bill; but remits to the Commissaries, with this instruction, to alter the interlocutor complained of, to find that the relation of husband and wife, wherever originally constituted, and the parties therein connected, are entitled to the same protection and redress from the Courts of Justice in Scotland, as to wrongs committed in Scotland, that belongs of right to that relation by the law of Scotland; therefore, to sustain the action at the instance of the complainer as competent, and to proceed accordingly: but sists execution till the eighth sederunt day of next Session; and ordains that the whole proceedings, comprehending the notes of the opinions of the Commissaries in process, be forthwith laid before his Majesty's Advocate, that, in case it may appear to his Lordship fit and regular to ascertain by a proceeding at his instance, and a full discussion, whether the instruction here given to maintain the extent of jurisdiction, required by the demand of the present action, be correct or not, there may be sufficient time to all concerned to reclaim to the Court; and if a reclaiming petition is put in, recommends to subjoin thereto copies of the notes of the opinions of the Commissaries, together with the interlocutor and notes of the Lord Ordinary in the cases of Tewsh and Hillary, subjoined to the Faculty Decisions, in a note to No. 80, June 11, 1811, to which reference is occasionally made in those opinions."(a)

His Lordship also, with this interlocutor, gave a note of his opinion in these terms: "The Ordinary has had recourse to the above mode of proceeding, because, while the instructions in the interlocutor flow from the opinion he is still under the necessity of entertaining, according to all his ideas of law and practice, it appears to him the only probable way by which the question may soon be tried after sufficient discussion by the Court. In the present case, the defender has not appeared; and the pursuer complains (he is informed) of being under pecuniary difficulties to carry on even that discussion which the recommendation in the interlocutor may possibly lead to.

"If, however, a reclaiming petition is put in, the Ordinary hopes the observations in the notes in the cases of Tewsh and Hillary will be more deeply considered, and better sifted, than they appear to him to have yet been.

"The Commissaries hold that it is a condition of the contract, crea-

of adultery. Yielding to a supposed weight of authority so great, the opinions of his brethren being also different from his own, and the arguments of the Bar being directed to establish, that the possession of jurisdiction, at least when accompanied by a presumptive domicil, was enough to warrant the inference, that the municipal law should exclusively govern the decision; he is conscious that he did not then follow out the principles which seem to justify the preference of the law of the real domicil to the length requisite, in order to render the reasoning upon that side altogether consistent.

(a) This order was the first intimation any of the Commissaries received that their opinions had been made part of the process. At the time their judgment was pronounced, the pursuer's counsel, at the Bar, requested the use of the notes of the Judges, which was granted. As to the lodging of these notes in process, and appointing them to be printed, they were not consulted; but they did not conceive that they could, with propriety, make any objection to the order of Lord Meadowbank.

tive of the relation in the present case, that the marriage was to be indissoluble; but this is not proved by the only circumstance urged in favour of the doctrine, viz. that the law of England does not commit to any court of justice authority to divorce *a vinculo matrimonii*. By marrying in England, parties do not become bound to reside for ever in England, or to treat one another in every other country where they may reside according to the provision of the law of England. Their obligation is to fulfil the duties of husband and wife to each other, in whatsoever country they may be called to in the course of providence; and they neither promise, nor have power to engage, that they shall carry the law of England along with them, to regulate what the duties and powers are which they shall fulfil and exercise, or the redress which the violation of those duties, or abuse of those powers, may entitle to. All of these functions belong to the law of the country where they may eventually reside, and to which they unquestionably contract the duties of obedience and subjection whenever they enter its territories.

“And, farther, this supposed condition, even if it had the will of the parties in favour of it by any stipulation, however express, could derive no force from that circumstance. It is too obvious to admit of doubt, that no quality can be created in the relation of husband and wife by positive or implied agreement. The Commissaries certainly would not dismiss an action of divorce because the parties, at intermarrying, had in the most formal manner renounced the benefit of it, and become bound that their marriage should be indissoluble. Nor would it be any objection to a divorce, at the instance of a Roman Catholic, that his marriage was to him a sacrament, and, therefore, by its own nature indissoluble. These are all *pacta privatorum*, and cannot impede or embarrass the steady uniform course of the *jus publicum*, which, with regard to the rights and obligations of individuals affected by the three great domestic relations, enacts them from motives of political expediency and public morality, and nowise confers them as private benefits resulting from agreements concerning *meum et tuum*, which are capable of being modified and renounced at pleasure. Accordingly, the case of Campbell of Carrick, in rejecting the competency of any personal objection to bar a pursuer of declarator of marriage, establishes, by the highest authority, the incompetency and inefficiency of any obligations, not sanctioned by the common law, to operate on matrimonial rights. It is obvious that personal objections in bar of actions must have lain, could the benefits claimed be either modified or renounced by the agreements or deeds of parties.

“But if this supposed condition can derive no force from the will of the parties, it seems palpably impossible that it should derive any from the *dicta* of the municipal law, where the relation originated, so as to give it efficacy *ultra territorium* where *jus dicenti impune non paretur*. In the fulfilment of ordinary contracts, as to *meum et tuum*, the *lex loci contractus* forms implied conditions of the contracts, and is accordingly adopted abroad as furnishing the means of construing them aright. But this is merely a proceeding in execution of the will of the parties, and not in the least a recognition of the authority of a foreign law. The case therefore is quite different where the will of the parties only constitutes, and does not modify, the relation or its rights; and where, of course, the municipal law, deriving nothing from stipulation

or agreement, is merely the positive institution of the sovereign, and cannot direct the decision of foreign courts on circumstances occurring within their own jurisdiction.

“ But it is said that, in the case of this defender, who is domiciled within the *imperium* of the law of England, as his personal succession, wherever situated, would be regulated by that law, his matrimonial obligations, and the redress of wrongs, relative to them, ought to be regulated by the same law. But it is to be observed that, in questions of succession, the *lex domicilii* regulates; because, as the right of testing by a positive declaration of will is recognised *jure gentium*, the presumed will of a defunct is also to be enforced by the same law, and that will must be gathered from the rules of intestate succession in his own country, which he probably intended should regulate its descent. Matrimonial rights and obligations, on the contrary, so far as *juris gentium*, admit of no modification by the will of parties, and foreign courts are, therefore, nowise called upon to inquire after that will, or after any municipal law to which it may correspond. They are bound to look to their own law; and it is, with all deference, thought to be in a particular degree contrary to principle to make that law bend to the dictates of a foreign law, in the administration of that department of internal jurisprudence which operates directly on public morals and domestic manners. Would a husband in this country be permitted to keep his wife in an iron cage, or beat her with rods of the thickness of a Judge’s finger, because he had married her in England, where it is said this may be done? Or would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and of course incapable by the law of that country of contracting marriage? This category of law does not affect the contracting individuals only, but the public, and that in various ways; and the consequences would prove not a little inconvenient, embarrassing, and, probably, even inextricable, if the personal capacities of individuals, as of majors or minors, the competency to contract marriages, and infringe matrimonial obligations, the rights of domestic authority and service, and the like, were to be qualified and regulated by foreign laws and customs, with which the mass of the population must be utterly unacquainted. Accordingly, the laws of this description seem nowhere to yield to those of foreign countries; and, accordingly, it is believed, no nation has ever hitherto thought of conferring powers and forms on its courts of justice adequate for enabling them to exercise over foreigners regular authority for enforcing the observance by them of the laws of their own country, when expatriated. In fact, the very same principles which prescribe to nations the administration of their own criminal law, appear to require a like exclusive administration of law relative to the domestic relations. Hence, in both England and Scotland, the most regular constitution abroad of domestic slavery was held to afford no claim to domestic service in this country, though restricted for only such service, and under such domestic authority, as our laws recognised. The whole order of society would be disjointed, were the positive institutions of foreign nations, concerning the domestic relations, and the capacities of persons regarding them, admitted to operate universally, and form privileged casts, living each under separate laws, like the barbarous nations during many centuries after their settlement in the Roman empire.

“ The Ordinary does not know whether it is worth adding, that though

nothing is said on the head in the interlocutor on the bill, he does not perceive that, even granting the premises of the judgment complained of, it would follow that the action ought to have been dismissed. Is there any rule of Court to prevent a party claiming divorce *a vinculo* to restrict his demand to separation *a mensa et thoro*? If not, there seems nothing in the nature of the thing to prevent it,—a verdict finding culpable homicide is competent on a libel charging murder.

“The Ordinary thinks it necessary to add, that he is quite certain there is a great misapprehension, by one of the Judges, as to President Blair’s opinions respecting the present question; and the Ordinary took an opportunity of stating this in writing to another of their number.”

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Note (B.) p. 355.

COLLUSION, it is evident, is more likely to take place often in actions of divorce than in causes of any other description. But the parties who commit this offence against the course of justice have such facility of concealment, and the inquiry is of so difficult and unpleasant a nature, that the records of the Consistorial Court of Scotland do not perhaps exhibit a single attempt to detect this mal-practice, which has been successful in the result. When it became evident that English parties had very powerful temptations thus to agree to defraud the law of their own country in all cases where a husband and wife entertained a mutual desire to dissolve their marriage, and when it appeared that no other obstacle could be opposed with effect; the Commissaries, however, did, in the first place, as, for example, in the case of Lolly, and in others about the same date, extend the inquiries as *to collusion* under the oath of calumny, which were regulated by no statute, and rested upon the authority merely of their own practice. Thus the *formula* of that oath now in use was made to embrace all the following points: “Compeared A. B. pursuer, who, &c. depones, That there has been no concert or collusion between him and the said defender in raising this action, in order to obtain a divorce against her, nor does he know, believe, or suspect, that there has been any concert or agreement between any other person on his behalf and the said defender, or any other person on her behalf, with a view or for the purpose of obtaining such divorce. All which is truth, as the deponent shall answer to God.”

Still, however, there was reason to think, that, by previous arrangement of their conduct, parties pursuers who were aware that this oath must be taken, found no great difficulty in preparing for that test. Occasionally indications appeared, in the course of the procedure, of opportunities to discover whether a concert had really taken place between parties in this situation to obtain a divorce, as an object both of mutual desire and mutual endeavour. But the Judges of the Court could not themselves prosecute any extrajudicial investigation, or do more than decide upon such matter as might be laid before them.

The Procurator-fiscal was one of the officers in this judicature whose name still appeared as for the public interest, particularly in all cases of divorce, and who originally had performed many active and important duties, although his situation had become a mere sinecure.

For example, in the earliest part of the judicial record which is extant, the Procurator-fiscal appeared to have been in regular attendance at every sederunt of the Court as an active officer, and sometimes the cause proceeded at his instance as the leading party. Thus the record bears, that, on the 11th of July 1565, an action was commenced upon a “pre-

cept by Henry Kinross, Procurator-fiscal, to our Sovereign Lady," to set aside the second marriage of "Custine Stevenson" with "Agnes Pollock," the paramour, for adultery with whom he had been divorced from his first wife, who gave *her concurrence* to this action of the Procurator-fiscal, and decree was pronounced accordingly. This proceeding, too, seems to have been sanctioned by the common law antecedent to the act 1592, cap. 117, which assumes marriages between persons guilty of adultery to have been previously, and by their own nature, unlawful in this country.

The original commission to the first Procurator-fiscal of this judicature has not been found, but, from the commissions to the Procurator-fiscal of the Consistorial Court, which are preserved in the record of the office of the Privy-Seal, it appears, that, on the 4th of September 1578, King James VI. by special commission, constituted Mr. Robert Danielston, as successor to Mr. Henry Kinross, (a) "his Majesty's Procurator-fiscal, in all action and causes concerning his Hieness, and his interes befor the Commissaris of Edinburgh, givand to him ye office quairof, with all fees, casualtyis, and duties belonging yairto, during all the dayis of his life, sicklike as umquhill Mr. Henrie Kinross, last Procurator-fiscal had, for using and exercising of the samen of before, with power to the said Mr. Robert be himself and his deputes, quhome our Soverane Lord gives him power to mak, and for quhilk he shall be holden liable, to use and exerce the said office in all, and be all things, and to intromit with, and tak up all fees and dueties pertaining yairto, sicklike, and also free as the said umquhill Mr. Henry usit and excercit the samen of before, during the space foresaid." (b)

The subsequent commissions likewise refer to those preceding.

The Commissaries having always had the power, and been in use to make regulations relative to the duties and practice in their own judicature, under the title of Acts of Sederunt, therefore, (21st May 1813,) directed this officer to attend examinations as to collusion, and when there might appear "reasonable ground of suspicion, to make such inquiry, and move for such investigation as he finds to be legal and competent to detect collusive agreements, in cases of divorce, entered into, not only by the parties themselves directly, but also through the medium of their agents, or persons in their confidence;" and likewise required the oath of calumny to be taken in the solemn consistorial form, as it is administered to witnesses.

In the case of Homfray against Newte, the pursuer, when examined as to collusion in this form, answered every question that was put, fully and explicitly, so far as regarded her own knowledge. Nor was there any reason to doubt the candour of her statements. But she mentioned that she had, for some time, during a separation from her husband, the defender, received an yearly allowance for her aliment, the rate of which had varied, and had been settled with him from time to time, not by herself, but by her father, who attended on her behalf during the dependence of the process at this stage, and by her attorney. According to her account, the communications, whatever these were, which had taken place with her husband, on her concerns, appeared also to

(a) Privy-Seal, book xlv. fol. 74.

(b) Privy-Seal Record, book cxiii. fol. 30. Royal Commission to present Procurator-fiscal, 8th March 1805.

have passed, not with herself, but with one or other of these gentlemen upon her part, and, in general, had not even been explained to her.

The Procurator-fiscal having attended her examination, presented a minute, praying that the father of the pursuer might be examined as to those particulars, in order to ascertain whether there had been any collusive concert or agreement made by him, as acting for his daughter, with the defender.

Upon considering this application, with answers, and hearing counsel fully on the point, the Commissaries (18th June 1813), “In respect it appears that the pursuer, in her deposition *de calumnia*, has made a reference to her father, Sir Jere Homfray, as to various particulars, which may be of importance, but as to which she states that she herself has no knowledge: Therefore, before farther procedure, appoint the said Sir Jere Homfray to appear in Court, and be judicially examined upon all pertinent interrogatories, tending to explain the motives and reasons which influenced the parties or their advisers for their behoof, in instituting and carrying on the present action, and grant warrant for citing him accordingly.”

A bill of advocacy was presented for review of this interlocutor, which Lord Reston, Ordinary, took to report, with memorials for the pursuer, and for the Procurator-fiscal; and the following judgment was pronounced (18th February 1814): “Having advised with the Lords of the Second Division, remits to the Commissaries, with instructions to alter their interlocutor, and to allow the process to proceed, as accords; and that no farther investigation, with regard to the supposed collusion, shall take place; also to find the Procurator-fiscal liable in the whole expences incurred upon the point in dispute: Finds him liable in the expences incurred in this Court, of which appoints an account to be given in, and, when lodged, remits the same to the auditor to be taxed.”

In the following case of St. Aubyn against O’Brien, Isabella Milligan, one of the pursuer’s witnesses, in whose house the crime of adultery had been committed by the defender (29th May 1813,) spontaneously made an unexpected statement in her deposition: “That when Captain O’Brien came to the deponent’s house, he told the deponent what had brought him there, and what had brought him to Scotland, and the purpose that he had come for, &c.: That Captain O’Brien also told the deponent that his wife and her friends did not dispute the *charge* against her,” (an allegation of the defender to the witness as to improper correspondence of his wife, which he pretended that he had detected,) “upon these letters; but that it had been proposed by them that he, Captain O’Brien, should come down to Scotland, to enable her to obtain a divorce, and that this measure was agreed upon between him and his wife’s friends. Depones, That in a conversation before his wife came to Scotland, Captain O’Brien told the deponent that his wife was to come here, and when she was to come here, and also that the cause for her divorce was put under the care of Mr. Donald M’Lean, writer to the signet; and he afterwards told the deponent, upon another occasion, that his wife had actually come to Scotland, and was lodging in George’s Street of this city,” &c.

The Procurator therefore moved for the judicial examination of Mr. M’Lean, in order to ascertain whether these averments upon oath of the witness were true. This application was not opposed, and the commissaries appointed that gentleman to be examined accordingly. He did not petition against this appointment, in obedience to which he attended

with his counsel, and although the latter entered upon the record a request for leave to state his objections to this proceeding, none was ever offered, and he *inter alia* declared (3d July 1813,) "That he was first consulted on this case by letter from Mr. Davie, an attorney at Plymouth Dock, on the part of the pursuer," &c.: "That he received another letter from Mr. Davie, stating that the defender was to be in Scotland by a particular time, and desiring the declarant to look out for him," &c.: "That when Captain O'Brien came here, which the declarant thinks he did soon after the time specified in Mr. Davie's letter, Captain O'Brien sent a message to the declarant to inform the declarant where he lodged, and requesting the declarant to come and call upon him," &c.: "That the declarant accordingly did wait upon Captain O'Brien. Declares, That Captain O'Brien was found at home by the declarant, and gave no other reason for sending his message to the declarant, to whom he was an entire stranger, but that Mr. Davie had mentioned the declarant to Captain O'Brien as likely to pay Captain O'Brien some attention at Edinburgh, where Captain O'Brien said he had come merely for pleasure and to pass a little time: That in the course of their acquaintance here, Captain O'Brien did, during a conversation with the declarant, introduce the subject of his own situation with his wife, and the declarant stopped him, when detailing the circumstances, by stating that he, the declarant, was Mrs. O'Brien's agent, and that it was improper to make any such communication to him. Declares, That Captain O'Brien, however, said that he supposed his wife would raise an action of divorce here, and that he understood she had formerly intended to do so in England. Declares, That at this time the summons was not executed, and the declarant does not think that Captain O'Brien spoke to him upon any other occasion about the divorce until it was executed," &c.

It occurred to one of the Judges when this declaration came to be considered, that, by the law of Scotland, it was necessary, to render it evidence, that it should be verified by Mr. M'Lean upon oath, and the Court therefore (9 July 1813,) "before answer, appointed Mr. M'Lean to appear in Court, in order to his being examined upon oath in the matters stated in said judicial declaration, and to answer all other questions which may be put to him by the Court, tending to elucidate the same; also to produce the letter received by him from Mr. Davie, in September last, and mentioned in his said former declaration, and his letter-book, from which the copy of his answers already produced was copied, in order that the same may be compared by the Court; and further, to produce all other letters received by him from Mr. Davie, or any other of the friends of the parties to this action, and authentic copies of his own letters to them, and all other writings in his custody, or to which he has access, which, directly or indirectly, tend to explain or elucidate the views of the parties or their friends, in advising, instituting, and carrying on this action."

A bill of advocacy was then presented by the pursuer, in which she was made to plead thus, as herself speaking in the first person:

"I. It has been customary for the Commissaries, in actions of divorce, to examine the parties *de calumnia*. Although this be a very unusual preliminary in judicial process, I did not object to it. I have complied with the order of the Commissaries, appeared in Court, and undergone an examination on oath, answering, in the course of a very

long and painful scrutiny, every question which their Lordships could propose, and leaving upon their minds, I have reason to believe (from my appearance and manner, and from the marks of truth which my whole examination displayed), a full impression that all was fair on my part, and that, in acknowledging my preference of a trial before their Lordships to a trial in the English Courts, I had disclosed all that was peculiar in my case. When, after this oath has been administered, and this examination undergone, I find myself obstructed by the detestable arts of the defender, and of common prostitutes hired to sow suspicion in the minds of my Judges, and when I find that the Commissaries have left the usual course of proceeding, to hunt out those suspicions by a parole proof, the duration of which cannot be anticipated, I humbly venture to state, that, with my oath *de calumnia*, the inquiry should have stopped, and that my action having been found competent, and a proof allowed and taken, it is now too late to go into any such inquiry. I am not now upon my trial for perjury, nor am I bound incidentally to submit now to a proof by witnesses. If this inquiry by the examination of witnesses was to take place at all, it is submitted, that it ought to have been entered upon previously to my being put upon oath. But it is further conceived, that this inquiry into the collusion, so far as it is sanctioned by the law, is to be conducted not in the way of a proof by witnesses, but only by the examination of the parties; and it comes to be a matter of infinite consequence to have this matter settled, from some late proceedings of the Commissary Court. That Court has, by act of sederunt, charged their Procurator-fiscal to attend as a party to all actions of this sort, and to investigate collusion, at the expense of the parties. In every case, therefore, a previous inquiry, of the most oppressive nature, is now to be expected, instituted by the Procurator-fiscal of Court, to the infinite delay of the remedy of divorce in cases of adultery, and attended with an expense so enormous, as (there being no party to pay that expense when improperly incurred) to form a bar to this remedy, contrary to the natural course of jurisdiction and the principles of the law.

“II. But even were this a legitimate subject of investigation by witnesses, surely the Commissaries have here proceeded in a manner a great deal too inquisitorial to be sanctioned by this Court. They have ordered the examination of my confidential agent, upon facts disclosed to him in that capacity, and called upon him for production of letters which, in his confidential character, he has received from me and from my agents in England. This, I submit, is a course of inquiry which cannot be taken against me. There are deposited with that agent, verbally and in writing, secrets which I will not have disclosed, which even my husband, as an adverse party against me, cannot force me to disclose, and which no Judge (with all humility I speak it) has power by the law to wrest from me. It is now quite established, both in this country and in England, that a confidential agent cannot be examined upon circumstances, or for production of papers communicated to him in that character; and this proceeds not upon any supposed interest or delicacy on the part of the agent, but on the ground, that it is *a privilege of the client*, with which no agent can dispense, as Mr. M'Lean, apparently under a sense of duty, has thought himself entitled or bound to do.

“This is grounded upon the great principle of expediency, that, to invade the privilege of secrecy between a person and his agent, is to de-

stroy at once all that necessary confidence, without which the affairs of life, and judicial business in particular, cannot be carried on. This doctrine was long ago laid down by Sir George Mackenzie in his Commentary on the Statute of James VI. Parliament 23, c. 18, and although there are no very express cases to be found in the books, the principles which that eminent lawyer has so well explained have uniformly directed judicial proceedings in this country.

“In England, the case has been tried, and decided very solemnly, in the case particularly of Wilson against Restall, in the King’s Bench, Term Rep. Vol. IV. p. 753. The general doctrine of the case is,

*‘That if any matter be disclosed to the attorney in the cause, he cannot be permitted to give it in evidence in that or any other action.’*

Judge Buller said, “It is a subject of just indignation, where persons are anxious to reveal what has been communicated to them in a confidential manner, and in the case mentioned, where Reynolds, who had formerly been the attorney of Mr. Petrie, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject, *while he was concerned as the attorney*, I strongly animadverted on his conduct, and would not suffer him to be examined; he had acquired his information during the time he acted as the attorney, and I thought *that the privilege of not being examined to such points, was the privilege of the party, and not of the attorney*, and that that privilege never ceased at any period of time. In such a case, it is not sufficient to say that the cause is at an end, the mouth of such a person is shut for ever.”

“Now, in the present case, it is the confidential communication, orally and in writing, which had been made to Mr. M’Lean, that the Commissaries are about to force that gentleman to disclose, and if the rule which has been now alluded to has any force at all, it must protect me against such disclosure, however willing Mr. M’Lean may be to obey the order of the Court.

“On the whole, I humbly submit to your Lordships, that there is here no ground on which the Commissaries can refuse to proceed in deciding on the merits of the case; that the story told by Captain O’Brien never can be suffered to defeat me of my remedy, or to serve to him as a protection; that the inquiry into which the Commissaries have entered, is not in itself competent as matter of parole proof, and, most especially, after the oath *de calumnia* has been taken; and, finally, that the Commissaries cannot force from my agent those confidential communications, of which I am the sole judge whether they ought to be disclosed.”

Deterred by the decision of the Superior Court against him, by which he was subjected in the expences of process, in the case of Newte, the Procurator-fiscal now made no appearance, and this bill being advised *ex parte*, Lord Reston, Ordinary, after reporting to the Court (3d March 1814), “Remitted to the Commissaries to recal their interlocutor, authorizing the examination of Mr. M’Lean by oath or otherwise, as to any confidential communications with his client, and to proceed in the cause as accords.”

This interlocutor was accordingly obeyed, and when the Commissaries came to dispose of the whole cause, they, by their judgment, found (16th December 1814), “That it is incumbent upon them, in the first place, to dispose of the allegation of collusion which has occurred in this

cause: Found, that this charge of collusion arose in the course of the pursuer's proof, from the deposition of Isabella Milligan, who stated upon oath, that the defender himself had expressly informed her, that collusion had been carried on through the intervention of Mr. Donald M'Lean, the pursuer's mandatory: Found, that as the defender's presence in this kingdom further appeared to the Court to be with the view of founding this action, which he likewise allowed to proceed in absence, they conceived it to be their duty, in a case so very anomalous as that of an action of divorce, brought under circumstances presumptive of collusion, and where a defender may thus have an interest not to oppose but to aid a pursuer, to depart from the ordinary rules of evidence, and to resort to Mr. M'Lean's examination, there being here a *penuria testium*, indeed an impossibility of obtaining any other evidence, arising from the very nature of the point to be investigated. But found that the pursuer having presented a bill of advocacy against the competency of examining Mr. M'Lean as a witness, Lord Reston, Ordinary, pronounced thereupon this interlocutor:" [Here follows the interlocutor.] "Found, that although this interlocutor does not prohibit the Court from having recourse to other means for the further investigation of the alleged collusion, they are not aware of any other by which the investigation can be pursued, but by taking the evidence of Mr. M'Lean, and employing the Procurator-fiscal of Court, who, as a party for the public interest in every action of divorce, appears to possess, *ex officio*, a right to watch over every thing connected with the purity of judicial procedure. But found, that in the case of Homfray against Newte, upon a bill of advocacy against the competency of employing the Procurator-fiscal, for the detection of collusion given into the Supreme Court, a remit was made to this Court by Lord Reston, after advising with the Lords of the Second Division." [Here follows the interlocutor.] "On the whole, therefore, found, that, although in the opinion of the Court there are strong presumptions of collusion in this case, yet the actual existence of it has not been established, and the Court is precluded from all further investigation in regard to it."

The objection of collusion, unless when evidence shall arise from the oath of the pursuer, may be considered as thus laid to rest; and perhaps it was vain to expect that any effectual obstacle could be opposed to fraudulent devices against the English law, in cases of divorce, by judicial inquiry upon this head. But it appeared to the Judges of the Radical Court, that the opinion of Sir George Mackenzie, referred to by the pursuer in her bill of advocacy, did not relate to the question, whether communications, with regard to an unlawful act then in contemplation, were to be regarded in the same light as consultations for defence in the trial of crimes even between the party and the agent of that party in the cause; and that the pursuer's argument could derive no support from the terms of the statute to which Sir George Mackenzie's Commentary referred. The English decision again seemed to relate to matter disclosed to the attorney "in the cause," and not to collusive practices, which had no other connection with the judicial proceedings, except that their object was to pervert the course of justice.

In the institutional works of our law, nothing direct upon this subject was found. But there seemed to be a variety of precedents. Thus,

in the case of Macleod of Cadbole against Macleod of Geanies,<sup>(a)</sup> the law was declared by the Supreme Civil Court of Scotland (in the words of Lord Kilkerran) to be, "That, although, after an agent is employed in defence of any action, he cannot be obliged to depone upon any thing communicated to him by his client in the course of the process; yet no agent can decline being examined upon the fact of his undertaking a criminal employment. Suppose, in the case of forgery, a copy of a deed had been sent to the agent, and he desired to cause forge a deed in terms of it, he could not, in an improbation, decline being examined on that fact." The decision, too, in that case, was a very solemn one, pronounced upon report by the Lord Ordinary, and the question related only to the expenses incurred in processes of suspension and multiplepoinding, which, it was alleged, had been occasioned by the procuring of arrestments collusively.

To prove this fact against his client (says Lord Kilkerran), "Geanies, among others, cited John Mackenzie, writer, Cadbole's agent, and he objected that his agent could not be obliged to depone against him. But the Lords repelled the objection, and found John Mackenzie ought to depone upon all facts and circumstances that he knows, with respect to Cadbole's endeavouring to procure the arrestments, prior to the time that the complaint anent the said arrestments was moved in the Court of Session in the process of suspension." A reclaiming petition, in the agent's own name, was likewise refused, and Lord Kilkerran says (p. 599), "What the Lords went upon was, That, although, after an agent is employed in defence of any action, he cannot be obliged to depone upon any thing communicated to him by his client in the course of the process: yet no agent can decline being examined upon the fact of his undertaking a criminal employment. Suppose, in the case of forgery, a copy of a deed had been sent to the agent, and he desired to cause forge a deed in terms of it, he could not, in an improbation, decline being examined on the fact. As little in this case could he decline being examined, whether the impetrating the arrestments had been known to him before the question was moved, in defence of which he was afterwards employed, or whether he had advised the impetrating thereof."

In the subsequent case, of the Earl of March against Sawyer (21st November 1749), also reported by Lord Kilkerran, the Court of Session had no doubt "sustained the objection to Dickie," who had been adduced as a witness to prove the delivery of an heritable bond for 10,000*l.* sterling, by the Earl's mother, to Anthony Sawyer, her second husband, as her disponee, that he was Mr. Sawyer's agent. But upon appeal, the House of Peers reversed this judgment; and, according to Lord Kilkerran's report, "When the cause came again into Court, upon the question moved, whether the judgment of the House of Peers was to be understood as only allowing him to be received upon the delivery of the deed, or if he was allowed to be received at large? The Lords, in respect there was no limitation in the judgment, found he was to be received at large."

In another case, of Maclatchie against Brand, 27th November 1751, Fac. Col., Archibald Malcolm, writer in Dumfries, was also found by the Court of Session to be inadmissible as a witness, because he had

(a) 21st December 1744, Kilk. Decisions, *voce* Witness, No. 7, p. 598.

given advice to the defender, and corresponded with his agent upon the cause. But this judgment likewise was reversed upon appeal, and the evidence of Malcolm allowed to be received. Accordingly, in the subsequent case, of Scott against Caverhill, 19th December 1786, Fac. Col., Mr. Cornelius Elliot, writer to the signet, was, by an unanimous judgment of the Court of Session, admitted as a witness to support a deed of settlement which he had prepared as agent of the testator, and in an action to set aside which he acted as agent for the defender, by whom he was adduced.

In further explanation of the reasons by which the Commissaries were influenced in this proceeding, it must likewise be observed, that Mr. M'Lean was precisely in the situation of Malcolm, the witness in the reported case which has been referred to. He held a mandate from the pursuer, but he was not a solicitor in the Consistorial Court, therefore could not be her agent there. His evidence, too, was necessary, if the fact sworn to by Milligan was to be made the subject of any inquiry.

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Note (C.) p. 356.

THIS cause was considered by the Commissaries in private, according to the usage which had prevailed in this Court for upwards of 150 years before. It was therefore impossible for the counsel to give the Lord Ordinary any further information as to the grounds of the interlocutor, or opinions of the majority of their number, in conformity to which it had been pronounced, than its own terms conveyed.

A single Judge, as himself constituting a quorum, by monthly rotation then held the Court in public, and all interlocutors, after these had been read by the clerk, were merely subscribed by him upon the bench. In cases which he might deem of peculiar difficulty, as upon the present occasion, these interlocutors were indeed previously prepared by general consultation of the whole Judges, called at his desire. But whether framed by himself, without assistance, or by the direction of the whole Court, it was not then usual for the officiating Judge to add explanation *viva voce*. The rest of his duty in public was to go through the roll, and hear and dispose of motions.

Upon examination of the earliest part of the record which is extant, it did, however, appear, that in the year 1565, and for some time afterwards, Consistorial causes had been often considered and judged by all the Commissaries sitting together *in judicio*, and in presence of all other members of the Court, and spectators, to whom it was open. But, in constituting this tribunal at the Reformation, the quorum had not been changed, and the various Consistorial Courts of the Catholic provinces and dioceses in Scotland had been held by a single Judge as Official. In this respect, the usage, in process of time, consequently reverted to its original state. Thus, although there were now four Judges, each of them, during his rotation of duty, held the Court singly, and, upon applications of parties, reviewed the interlocutors of his predecessor, and left his own to be reviewed in the same manner, by the succeeding Commissary.

At the date of the Revolution, it was farther observed, that the Civil, Criminal, and Consistorial Tribunals of Scotland, were in use to deliberate upon the decision of all causes entirely in private. But the statutes of the Scottish Parliament, anno 1693, cap. 26 and 27, opened the doors of

the Supreme Civil and Criminal Courts of this kingdom to the public. Imitation of their example, without any special enactment, also introduced the same salutary practice in the inferior jurisdictions of these great departments.

Although the Consistorial Court likewise was held in public, on the days of *sederunt*, and the Court of Review has ever since discussed Consistorial causes in the same manner as other questions, the Judges in the Radical Tribunal of this department continued at the date of the interlocutor in the case of Tewsh, to observe the old practice of giving their opinions only in consultation with each other, when specially summoned for the purpose, and in private. This circumstance, too, may be accounted for, both by the unpleasant predicament in which the officiating Judge was placed, either as reviewing an interlocutor of a colleague, of equal rank and jurisdiction with himself, or leaving his own to be reviewed in the same manner in his absence, and from the tenor of the original instructions, as to taking of proofs in secret.

About this time, however, the individuals in office had come to be convinced, that the practice of singly deciding and reviewing Consistorial causes was extremely inexpedient, and also that it would be of utility to decide all causes before them, which might not require privacy from their peculiar nature, in public, like the other Courts of Justice. To depart from the previous usage, in these respects, seemed also, after the most deliberate consideration, to be competent and lawful.

Under these impressions, the dissenting opinion in this case of Tewsh, for sustaining the jurisdiction, was given in public. For six years past, all subsequent Consistorial causes have been considered by the whole Bench. And, during the Sessions of the Courts of Common Law, the Commissaries have sat together, and delivered their opinions in public. The consequences of this change have likewise hitherto seemed to be altogether favourable to the due administration of justice in this department.

The opinions of the Judges, in the cases subsequent to that of Tewsh, which are here reported, may be compared, as they are given in this volume, with the interlocutors which they explain, with the notes, printed by order of the Superior Court, in an intervening case (*Gordon against Pye*), and with the notes of those practitioners, who may have attended to the whole proceedings, during the course of the last six years, in the questions relative to English marriages, and where English and Irish parties were concerned. It is believed, that not a single view or illustration will be found in the reports, which had not been stated in the course of the actual procedure. Indeed, more than three-fourths of the materials originally collected have been laid aside in this compilation. Freedom has, however, been used in the arrangement, to introduce, as seemed most convenient, each argument, whether as originally used, or repeated or referred to. And names, unknown beyond the limits of their own jurisdiction, as judicial authorities, have been omitted as unnecessary. To the reader, whose only object is information, these particulars are of no importance. But, in candour, the Reporter was bound to state them, and if it can appear improper to have published in this form, he can only now regret, that his own impression has been different.

It may be proper to observe farther, that, especially in the three last cases reported of *Levett*, *Forbes*, and *Rowland*, the judgments in the

cashiered by a court-martial for homicide, was found liable in assythment; and in that of Leiths against the Earl of Fife, donator of escheat, January 8, 1768, where, although the murderer had been indicted and outlawed, the assythment was likewise found due, because, in the opinion of the Judges, as reported, the term “means the reparation that is due to an innocent man who is hurt by a criminal act. In that sense, reparation or assythment is unquestionably due. If a man who is culpable only be liable in damages, what doubt can there be of his being liable, when the damages are occasioned by his being guilty of a flagrant crime?” Indeed, the only reason why a civil action for damages does not follow upon every patrimonial injury produced by crime, is the general inability of the delinquents to pay. But the right has always been recognised, and is undeniable. Thus the act of the Scotch Parliament 1593, cap. 174, declares “all remissions for thefte, riefte, slaughter, burning, and heirshippe, void and null, quhill (until) the party skaithed be first satisfied.”

Adultery, according to the law of Scotland, may, indeed, be punished as a crime in all cases. But, nevertheless, the action of divorce founded upon it is deemed by every authority purely civil.<sup>(a)</sup> The husband of an adulteress, it has been likewise repeatedly found,<sup>(b)</sup> has a civil action for damages against her paramour, whether there has been either a separate process of divorce or a criminal prosecution upon the same fact or not.

This point seems then to be sufficiently clear. But it is obvious, that the Primary Court was bound in duty, if possible, to remove all question upon it. For the whole series *rerum judicatarum* in its record was impeached by a doubt upon it, and the adoption of a different view, by which the civil action of divorce would be confounded with the criminal process for the public interest and at the public instance, to punish the crime of adultery, must go far to subvert the very foundation and principles of this Consistorial jurisdiction.

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Note (G.) p. 382.

THE report for the Faculty of Advocates, published in the last volume of their collection, gives the following accurate and authentic statement of the whole proceedings in the Court of Session previous to the dates of the several remits to the Commissaries, in the cases of Edmonstone, Levett, and Forbes, on the 5th of March 1816, and 1st June 1816.

*“Mr. Edmonstone’s Case.”*

“Mr. Edmonstone was born and educated in Scotland. He inherited a small patrimony secured on an heritable bond in Scotland. He entered into the army; and, after being some time on foreign service, left the army, and returned to Scotland. He afterwards obtained a company in a Scots militia regiment, then stationed in England. He there married, in 1805, the sister of the commanding officer, a Scotswoman, but who had resided for some time with her brother in England. The marriage was celebrated in the English form; the contract was drawn up in the Scotch form; the lady’s jointure was secured on the heritable bond

(a) Dirleton’s Doubts and Questions in Law, p. 34.

(b) Stedman against Stedman, January 29, 1744; Maxwell against Montgomery, March 7, 1787; Paterson against Bone, December 10, 1803.

due to her husband in Scotland. Sometime after the marriage (the parties did not agree how long, but Mr. Edmonstone appeared to have resigned his commission before the marriage, or, at least, to have made an arrangement, before the marriage, for resigning it, and did soon afterwards resign it,) Mr. Edmonstone returned, with his wife, to Scotland, where they had resided about eight years, when Mr. Edmonstone thought that he discovered that she was in the course of committing acts of adultery in Scotland.

“He immediately raised an action of divorce against her before the Commissaries. She pleaded in defence,—That the marriage having been contracted in England, where marriage is indissoluble, the indissolubility became part of the contract, so as not to be removed by the subsequent domicil of the parties in Scotland, or by the criminal act being, as alleged, committed there. The Commissaries, being equally divided, by a rule of their practice, sustained this defence. Against this judgment Mr. Edmonstone presented a bill of advocacy.

“*Mrs. Forbes’s Case.*

“Mrs. Forbes and her husband were natives of Ireland; and Mrs. Forbes, till her marriage, resided at Limerick, where she formed an acquaintance with Mr. Forbes, then an officer quartered in that town. The parties left Ireland together; and, in May 1794, were regularly married in the Scotch form at Portpatrick, from which, in a few days, they returned to Ireland. Soon after, Mrs. Forbes attended her husband to the continent, along with his regiment. He was alleged to have abandoned her society there, and to have come to Scotland sometime ago (of which Mrs. Forbes was informed in December 1813, or January 1814,) along with a female with whom he lived in open adultery.

“Mrs. Forbes immediately raised an action of divorce against him before the Commissaries, in which he appeared. The Commissaries being equally divided, gave judgment for the defender; finding, that, though the marriage ceremony was performed in Scotland, this being a question of *status*, must be determined according to the domicil of the parties at the time of contracting, which was Ireland, where marriages are indissoluble. Against this judgment Mrs. Forbes presented a bill of advocacy.

“*Mrs. Levett’s Case.*

“Mrs. Levett and her husband were natives of England. They were regularly married in England in 1802. They lived together till October 1810, when he deserted her. They were reconciled in March 1812 (after a prosecution for conjugal rights.) In February 1813, he deserted her again, and came to Scotland with a woman, with whom he continued to live there in adultery, having sold his house in England, and ceased to have any establishment there.

“Mrs. Levett raised an action of divorce against him before the Commissaries in October 1814. The Commissaries found, that the parties having been married in England, and their true permanent domicil being there, the marriage cannot be dissolved in Scotland. Mrs. Forbes presented a bill of advocacy.

“The Lord Ordinary reported these three bills to the Second Division. As they regarded the same general question, they were heard together, by special appointment, in presence of the whole fifteen

Judges. No appearance was made for Mr. Forbes or Mr. Levett. Memorials were afterwards ordered, in which the parties were particularly directed to attend to the following question, proposed by the Second Division to the First Division, and to the permanent Lords Ordinary of both Divisions:—"Is it a valid defence against an action of divorce in Scotland, on account of adultery committed there, that the marriage had been celebrated in England, or that the parties had been domiciled there when the marriage was celebrated in Scotland? Or, will it materially affect the defence, that the parties, although married in England, were Scotch persons, who had thereafter cohabited in Scotland, and continued domiciled there?"—Certain points were also suggested by the Court for the consideration of the counsel, in preparing the memorials.

"*Argument for the pursuers*:—It was argued specially, that Mr. Edmonstone's marriage, having been contracted between Scotch persons domiciled in Scotland at the time, and with the view of their living in Scotland, was to be considered as a Scotch marriage; and that, therefore, the Scotch remedy of divorce ought to be applied in the case of adultery: See Lord Mansfield's limitation of the general rule (that, in expounding and enforcing a contract, the place where the contract was entered into, and not that in which action is brought, ought to be considered), in *Robinson against Bland*, 1 *Black. Rep.* 256 [quoted in Lord Robertson's speech *infra*]; *Huber ad Pandectas*, lib. i. tit. iii. § 10; *Voet de Statutis, eorumque concursu*, sect. 9, cap. ii. § 5, 9; or, at least, if it was to be regarded as an English marriage, that it would be peculiarly hard, from the situation of the parties, to refuse the Scotch remedy. It was argued specially, that the constitution of Mrs. Forbes's marriage must be judged of as a Scotch contract; for that contracts are not judged of as to their constitution, by the law of the domicil of the parties at the time of forming the contract, but by the *lex loci contractus*, e. g. that marriages at Gretna Green, by persons domiciled in England, were valid in England.

"On the general question, how far an English marriage may be dissolved in Scotland, on account of adultery committed in Scotland, the outline of the argument was this:

"Indissolubility is truly no part of the contract of parties in an English marriage. A marriage celebrated in that country is, in substance and in form, the same as a Scotch marriage. A marriage was held indissoluble in England before the marriage act. In both countries parties agree to be bound till death. In cases of breach of contract, the laws of the two countries give redress in a different form. The Scotch Courts of law give a total divorce for adultery. . . The English Courts of law only give a separation *a mensa et thoro*; and Parliament grants a total divorce; but, in such cases, Parliament acts as a Court of Law; *Ellis on Proceedings in Parliament*, 1802, p. 235. If the contract of parties excluded their separation, the English Courts could never grant a separation *a mensa et thoro*, which is as contrary to the terms and purposes of the marriage as a total divorce; nor would Parliament grant a total divorce. The indissolubility is merely an effect of the form in which the English law gives relief. Accordingly, the English Courts of law would not grant a total divorce for adultery committed in England, even when the marriage had been contracted in a country which authorizes a total divorce for adultery by the Courts of law of that country. The indissolubility, then, not being a condition of the

contract, the general rules applies, that the state of persons, or personal qualities, excepting in so far as they are fixed by contract or transaction, or are fixed with relation to rights or privileges, duties, burdens, or liabilities in another country, depend exclusively upon the laws of the country where the party resides, whether it be a temporary or a perpetual residence; *Huber de jure civitatis*, lib. iii. § 4. cap. i. p. 611; *Zoesius ad Pandectas*, lib. 1. tit. iii. § 20.

“Even supposing that indissolubility should be held to be implied as part of the contract, it would not follow that it would have execution in this country. No doubt this, like other civilized countries, gives effect to foreign contracts (except deeds conveying heritage in this country), according to the *lex loci contractus*; but we do so as far only as consistent with our own law. Thus, in point of execution, we give the remedy according to our own law, without regard to the execution given by the law of the foreign country. Thus, also, the general rule is, that obligations entered into in a foreign country, and pursued for in Scotland, are extinguished by the Scotch prescription. And, if we do not give the execution of the foreign law, still less do we enforce a foreign contract, where we hold it to be contrary to justice, and prejudicial to the well-being of the state; *Huber ad Pandectas*, lib. i. tit. iii. The law of Scotland, according to the dictate of Scripture, and in conformity to the practice of almost the whole of the reformed Christian world, allows divorce for adultery; and the refusing it in the case of marriages contracted in one of the foreign countries where it is not given, would be prejudicial to the morality and happiness of this country, by bringing foreigners to commit adultery in this country, and by enabling Scotch persons to live in open profligacy, by contracting their marriage in a foreign country. Besides, this being a question of *status* and domestic relation, ought to be governed by the law of the domicil, as has been expressly found in the case of a slave brought into this country from the plantations; Knight against Wedderburn, 15th January 1778, and the English case of Somerset, the negro, there referred to. In Hogg or Lashley against Hogg, 7th June 1791, it was found, that the legitim due to children depends on the domicil, not on the place of contracting the marriage; and the same would have been found in the question between the same parties, 16th June 1795, as to the wife’s claim on the husband’s moveables, if it had not been barred by special contract.

“There would be no propriety or expediency in the Judges of this country adopting the English doctrine from *comitas*, in order to produce a uniformity of opinion in the two countries, it being said that the English Judges have, in the case of Lolly, refused to acknowledge the validity of a Scotch divorce in such a case: for we do not know all the circumstances of that case; and, if the English Judges decided wrong in that case, they might be set right by the Judges of this country persevering in the proper course. At all events, the Judges of this country ought to decide according to what is just.

“But, though indissolubility were part of the contract, and though that contract ought to have execution in Scotland, yet there is a subsequent transaction, the adultery, which must be judged of by the *lex rei gestæ*; and, as we allow foreign contracts to be extinguished in Scotland in modes, or by evidence, which may not be admitted by the law of the foreign country, the same must apply in the case of adultery, which, by

the law of Scotland, affords ground for dissolving the contract of marriage.

“As to the precedents, the case of *Brunsdone* against Sir Thomas Wallace, 9th February 1789, does not apply, as Sir Thomas had not only not been married in Scotland, but had never been in Scotland after his marriage. The case of *Lindsay* against *Tovey*, 26th January 1807, which was carried to appeal (*Dow's Reports*, p. 124,) was merely remitted for reconsideration, and was not decided. And it is only of late, that the Commissaries have scrupled to grant divorces in cases like the present; *Duke of Hamilton*, in the Commissary Court, 1794; *Murray* against *Lindley*, 8th March 1805; the cases of *Paget*, *Lady Hillary*, *Tewsh*, *Newte*, *O'Brien*, *Pye*. The interlocutors of the Commissaries in the cases of *Newte* and *Pye* were altered by Lord Meadowbank, who, as appears from his Notes, printed and produced, entertained no doubt upon the point.

“*Argument for Mrs. Edmondstone*.—(No appearance was made for the other two defenders.) It was argued specially, That, in point of fact, she and her husband were not domiciled in Scotland at the time of the marriage; that, in point of law, the place of the domicil, at the date of the contract, does not signify, but the place of the contract; that, in point of fact, they did not contemplate to return immediately to Scotland, in order to reside there during their lives: and that, in point of law, where it is intended that a contract is to be framed with a view to its being executed in a foreign country, according to the laws of that country, the exclusion of the laws of the country in which the contract is framed, must be made in clear and express terms, which was not done here.

“On the general point, the argument was to the following effect:—

“Indissolubility is part of the contract of an English marriage. It is a known condition of such a marriage, imposed by the *lex loci contractus*, which must be held to be part of the contract, as much as any condition in a sale or other consensual contract, which, though not expressly covenanted upon, being the known law of the land, makes an essential inseparable part of such sale or contract. Indeed, it is a condition which the parties cannot dispense with. The indissolubility arises from this, and not from the constitution of the English Courts. The necessity of an act of Parliament (which it is impossible to mistake for a judicial procedure) shews, that a special law is required to derogate from the general law. Accordingly, in the case of *Lolly* (not yet reported,) the twelve Judges of England found, that a man married in England, divorced by the Commissaries in Scotland for adultery committed here, and marrying again in England, was guilty of bigamy; on the ground that the sentence of no Court, but only the act of the British Legislature, can dissolve an English marriage.

“It is a general doctrine, that, *ex comitate*, all foreign contracts are expounded and enforced, not according to the law of the place where action is brought, but according to the law of the *locus contractus*; *Huber*, Vol. II. lib. i. tit. ii. § 8 and 9; *Bankton*, b. i. tit. i. § 76, 78; Lord Mansfield's words, in *Robinson* against *Bland*, 1 Black. Rep. 256; *Mitchell* against *Burnet* and *Mowat*, 11th December 1746, *Kilk. Foreign*, No. 3; *Lawson* against *Maxwell*, 12th February 1784. The objections made to the application of this doctrine to the present case are not sufficient. As to the argument that a divorce is merely a remedy or

mode of execution, and that such are regulated by the law of the country where action is raised; though this might apply if the English law admitted divorce for adultery in one form, while we give it in another form, it does not apply where the law of England denies entirely the right of divorce. As to the argument, which was in one case sanctioned by the Court, Delvalle against York Buildings Company, 9th March 1786, that the Scotch prescriptions apply to obligations constituted by English contracts, as rules of Scotch process, which has some analogy to Scotch divorces, that decision was reversed on appeal; and the contrary has since been found, York Buildings Company against Cheswell, 14th February 1792. The denying of divorce for adultery is not contrary to the general usage of the greater part of reformed Christendom; neither is it contrary to good morals, separation *a mensa et thoro*, and other remedies, being found sufficient to keep adultery in check; nor is it contrary to the policy of the law of Scotland, which only *permits* such a remedy if the party choose to avail himself of it, but does not *enjoin* it; nor would any harm arise, from giving in this country the redress allowed by the *lex loci contractus*. As to its being a question of *status*, and, therefore, to be governed by the law of the domicil, the general law is, that questions of *status* are governed in that way, but questions of *status*, in general, arise from physical facts quite different from contract, *e. g.* male and female, *pubes* and *impubes*, sane and insane, &c.; and many of the questions arising from the contracts of marriage and of service, *e. g.* the wife's liability to imprisonment for debt, &c. are somewhat of the same nature, being relations between the state and the individual; but the personal mutual obligations in these two contracts, such as indissolubility in the case of marriage, and the personal mutual obligations in all ordinary contracts, must be ruled by the *lex loci contractus*. The case of Knight, the negro, is not a precedent for the general case, as it proceeded upon the injustice of the law of Jamaica. If the pursuer's doctrine be admitted, we must sustain as valid a divorce of a Scotch marriage, granted in Prussia for incompatibility of temper, &c.

“As in Scotland, divorce for adultery is not thought material, but is merely allowed; and as, in England, the indissolubility of marriage is thought essential, which is evinced by the judgment in Lolly's case; and, as the worst consequences would ensue if persons were to be held to be divorced in this country, and not in England; and, as England is not a foreign country, but part of the same kingdom; we ought, in this case, *ex comitate*, to adopt the English doctrine.

“The place of the *res gesta*, the adultery, does not alone determine the law by which the case is to be judged; but must be taken in connection with the previous contract. Thus, though the payment of six per cent. in Scotland, under a Scotch contract, be usury, the payment of that rate in Scotland, under a contract *bona fide* entered into in a country where that rate is legal, is not usury.

“The precedents are either in favour of the defender, or leave the question open; Dods against Westcombe, 11th June 1745, Kilk. Forum competens, No. 2; Brunsdone against Sir Thomas Wallace, 9th February 1789; Duke of Hamilton in the Commissary Court, 1794; Pirie against Lunan, 8th March 1796; Murray against Lindley, 8th March 1805; Lindsay against Tovey, 26th January 1807, which was appealed; Several cases which occurred in the Commissary Court pending that ap-

peal; Doubts expressed in the House of Lords in the case of Lindsay, which was remitted, Dow's Rep. p. 124.

*“Opinions of the Judges.*—The Judges of the First Division, and the permanent Lords Ordinary of both Divisions, returned the following answer to the question proposed by the Judges of the Second Division:

“The ten Judges, to whom the above question has been referred, having maturely considered it separately, and having also conversed together on the subject, are unanimously of opinion, that it is not a valid defence against an action of divorce in Scotland for adultery committed there, that the marriage had been celebrated in England; nor that the parties had been domiciled there when the marriage had been celebrated in Scotland. And, lastly, they are of opinion, where the parties are Scots persons, happening to be in England when their marriage was celebrated, but who, thereafter, returned to Scotland, and cohabited and continued domiciled there, that these circumstances can never aid the defence against an action of divorce in Scotland for adultery committed there, on the ground that the marriage had been celebrated in England; on the contrary, they are of opinion, these circumstances will materially support the plea of the pursuer of divorce.

“In giving this opinion, they think it necessary to add, that they take it for granted, that there is no objection to the jurisdiction of the Court, from the want of that residence or domicil in the parties, which is necessary to found civil jurisdiction; and also, that there is no proof of collusion between the parties, either by direct evidence, or necessarily arising out of the circumstances of the case; as they mean to give their opinion only on the abstract question put to them, and to say, that the mere fact of the marriage having been celebrated in England, whether between English or Scots parties, is not *per se* a defence against an action of divorce for adultery committed here.”

“At the advising (on 5th March), opinions to the following effect were delivered by the Judges of the Second Division:

“*Lord Meadowbank.*—I retain entirely my former sentiment upon the general point; and concur with the argument for the pursuers.

“*Lord Robertson.*—(His Lordship stated the facts in Edmondstone's case.)

“In these circumstances, the pursuer brings his action of divorce before the Commissaries, libelling on acts of adultery committed by the defender in Scotland, and concluding for divorce *a vinculo matrimonii*.

“The defence, after a general denial of guilt, is, that the marriage was celebrated in England; that, by the law of that country, marriage is indissoluble except in Parliament; and that, as the Court must judge according to the *lex loci contractus*, it cannot pronounce sentence of divorce *a vinculo matrimonii*. The Commissaries have sustained the defence, and the case is now brought under our review by advocacy by Mr. Edmondstone.

“The pursuer has endeavoured to show, that, by the law of England, marriage is not indissoluble, and, as it could not be denied, that it was in Parliament alone that any dissolution could take place, he was driven to the necessity of maintaining that the proceedings in Parliament, on a bill of divorce, were truly of the nature of judicial proceedings. How the law of England stands as to this point, is not, properly

speaking, a matter of argument in this Court. The law of England, like that of every other foreign country (and England, in such cases, is held to be a foreign country), is to us merely a matter of fact. Now, of the fact we have the best possible evidence, for the Lord Chancellor, in the case of Tovey and Lindsay, stated, that the Twelve Judges had lately decided in Lolly's case, that, "as, by the English law, marriage was indissoluble, a marriage contracted in England could not be dissolved in any way, except by an act of the Legislature;" Dow's Reports, I. 125. Now, an act of Parliament dissolving a marriage, is not of the nature of a judicial proceeding, but is truly a *privilegium*, in the strict legal sense of that term, viz. "An act of the supreme power of the State regulating the rights of private parties in a case where the Courts of law have no powers."

"Holding, then, that the marriage of the parties having been celebrated in England, is by the law of that country, indissoluble, we must now consider whether the Courts of this country are bound to decide according to the *lex loci contractus*, or whether, in the circumstances of the case (in which it appears, that the parties are domiciled in Scotland), they must take cognizance of the cause, and decide according to the laws of this kingdom.

"As the whole plea of the defender rests on this proposition, that the decision of this case must be regulated by the *lex loci contractus*, it is necessary to inquire in what circumstances a Court of law is bound to regulate its decisions by the *lex loci*, in preference to the law of the country in which the action is brought, and in which the parties are domiciled, and how far that rule is to be extended. In every question regarding the validity or effects of a personal contract, the first object to be attended to is, what was *actum et tractatum* between the parties. If the parties have bound themselves to any thing that is not *contra bonos mores*, such contract will be effectual all the world over, and will be enforced in every Court. When an action is brought to enforce performance of a contract executed in a foreign country, the first question is, where is the evidence of the contract? The evidence of such contract or obligation may be a written instrument, not according to the forms required by the law of that country in which the action to enforce performance is brought, e. g. a bond not probative in terms of the acts 1681 or 1695; but our Courts would not hesitate to sustain action on such bond. This will be done, not from any *comitas* to the law of a foreign country, but because a contract so executed is evidence of the agreement of the parties, and that they had in view the law of the country where they contracted, and that they meant to be bound by it.

"But, although the rule as to the *lex loci contractus* is of very general application, particularly as to the constitution and validity of personal contracts and obligations, it is not universal.

"In the first place, it does not apply to contracts or obligations relative to real estates. This point need not be enlarged upon.

"In the second place, no regard is paid to the *lex loci* where it appears that the parties had a different law in view at the time they entered into the contract. This is explicitly laid down by Lord Mansfield in Sir John Bland's case. "The general rule" (said his Lordship), established *ex comitate et jure gentium*, is, that the place where the contract is made, and not where action is brought, is to be considered in expounding and enforcing the contract. *But this rule admits of an*

*exception where the parties at the time of making the contract had a view to a different kingdom;*" 1 Black. Rep. 256. The defender has laboured hard to show, that the exception mentioned by the learned Lord is merely an *obiter dictum*, and not of the same authority as the deliberate opinions of that great and eminent Judge. I cannot view it in that light. The *lex loci* is to be considered in expounding or enforcing a contract, not from a blind deference or *comitas* towards a foreign law, but, because it is presumed, that the parties had in view the law of the country in which the contract was entered into, and that they meant to be bound by it. But this is only a *presumption*, and cannot be regarded where the contrary appears. The opinion of Lord Mansfield is confirmed by those of Huber and Voet quoted.

But there is another set of cases in which also the *lex loci* is disregarded; I mean those cases in which the *lex loci* is contrary to the general and universal rules of justice. This may be exemplified by the decision in the case of Knight, the negro, 15th January 1770. His master bought him as a slave in Jamaica, where such purchases are legal. Neither the purchase, nor the legality of it according to the *lex loci*, were denied; but the Court held, that the dominion assumed over the negro under that law, being in itself unjust, could not be supported in this country to any extent, and a judgment, proceeding on the same principles, was pronounced in England in the case of Somerset. Neither would our Courts pay any regard to the *lex loci* where it was *contra bonos mores*, where it was inconsistent with our religion, or where it was contrary to the great and fundamental principles of public law. I need not say that I do not mean that innumerable class of laws which are intended for the regulation of matters, which are in themselves to a certain extent indifferent, but such public laws as affect the interests of religion and morality, and the general well-being of society. It is quite inconsistent with every idea of good government to suppose that the laws of our own country, when of this last description, are to give way to the laws of any other country whatever.

“What I have now stated may be reduced to the following propositions: 1<sup>st</sup>. That the regard which is paid to the *lex loci contractus* does not arise from any blind deference to the law of a foreign country, but is founded on the legal presumption, that the parties had in view the law of the country where the contract was executed, and intended to bind themselves accordingly. 2<sup>d</sup>. That the application of the *lex loci*, though general, is not universal. That it does not take place as to contracts relative to real estates. That it does not take place where the parties, at the time of entering into the contract, had the law of another kingdom in view; or where the *lex loci* is in itself unjust or *contra bonos mores*, or contrary to the public law of the State as regarding the interests of religion or morality, or the general well-being of society. In short, the *lex loci* is not of universal application, but may, or may not, be applied according to the nature of the contract, as it may be affected by the circumstances I have mentioned.

“Marriage being entirely a personal *consensual* contract, it may be thought that the *lex loci* must be resorted to in expounding every question that arises relative to it. But it will be observed, that marriage is a contract *sui generis*, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts, may not apply to this. The contract of

marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will; it confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract.

“No wonder that the rights, duties, and obligations, arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country; and such laws must be considered as forming a most essential part of the public law of the country. As to the constitution of the marriage, as it is merely a personal consensual contract, it must be valid every where, if celebrated according to the *lex loci*; but, with regard to the rights, duties, and obligations, thence arising, the law of the domicil must be looked to. It must be admitted, that, in every country, the laws relative to divorce are considered as of the utmost importance, as public laws affecting the dearest interests of society. With us the laws relative to divorce are founded on divine authority. How can a person withdraw himself from obedience to such laws? Are these laws relaxed as to a person domiciled in Scotland, because his marriage is contracted in a country where the law of divorce is different? If two natives of Scotland were married in France or Prussia, according to the laws of those countries, the marriage would no doubt be valid here, but would they be entitled to come into the Commissary Court, and insist for a dissolution *a vinculo matrimonii*, merely because their tempers were not suitable, which, in France, was a ground of divorce, or for any of the numberless reasons for dissolving a marriage which are allowed by the laws of Prussia? But, if we would not listen to the *lex loci* when it facilitates divorce to a degree which our law considers as inconsistent with the best interests of society, and as not warranted by the Divine law, on what principle are we to give effect to the *lex loci* which prohibits divorce, even *adulterii causa*, though permitted in this country under the sanction of the Divine law? I agree entirely with what is well expressed by Lord Meadowbank, Appendix to bill of advocacy for Edmonstone, p. 9.

“It is said that in every contract, the parties bind themselves, not only to what is expressly stipulated, but also to what is *implied* in the nature of the contract, and that these stipulations, whether express or implied, are not affected by any subsequent change of domicil. This may be true in the general case, but, as already noticed, marriage is a contract *sui generis*, and the rights, duties, and obligations, which arise out of it, are matters of so much importance to the well being of the State, that they are regulated, not by the private contract, but by the

public laws of the State, which are imperative on all who are domiciled within its territory. If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the Judge's finger, would it be a justification, in any court, to allege that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?

“In short, although a marriage which is contracted according to the *lex loci*, will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties, yet many of the rights, duties, and obligations, arising from it, are so important to the best interests of morality and good government, that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance that the marriage was celebrated in a country where the law is different. In expounding or enforcing a contract entered into in a foreign country, and executed according to the laws of that country, regard will be paid to the *lex loci*, as the contract is evidence that the parties had in view the law of the country, and meant to be bound by it; but a party who is domiciled here, cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to those great and important public laws which our Legislature has held to be essentially connected with the best interests of society.

“Forbes's case is different from that of Edmonstone. The parties are natives of Ireland; they were domiciled in that country; they came to Scotland, as far as appears, merely for the purpose of being married in this country; they remained only for a few days, and then returned to Ireland. At the distance of many years the defender came to Scotland, and there committed acts of adultery, on which this action of divorce *a vinculo* is founded. Although the marriage was celebrated in Scotland, yet, in the circumstances stated, parties must be presumed to have had the law of Ireland in view in every thing relative to the rights, obligations, and duties, arising from the *status* of marriage; 2d, I see no evidence that the defender had such a residence in this country as to create a jurisdiction *ratione domicilii*. I doubt much, whether a residence in Scotland, and committing adultery there, for the purpose of creating a jurisdiction in the courts of this country, which they would not otherwise have had, would not be a fraudulent device to elude or defeat the law of that country to which the parties are subject.

“Neither is there evidence of the domicil in the case of Levett; and in both cases the domicil must regulate.

“Upon the whole, I think that Edmonstone's case ought to be remitted to the Commissaries, with instructions to proceed in it; and that, in the other two cases, there ought to be farther inquiry as to the domicil.

“*Lord Bannatyne*.—This is a question of international law.

“It is said, that, by the law of England, marriage is indissoluble. I take that for granted. The opinion of the Twelve Judges is decisive upon the point.

“But on what ground is marriage indissoluble in England? It is said by the defender, that its indissolubility is fortified by the terms of the agreement, the parties taking each other for husband and wife till

death do them part. But I do not think this a just view of the subject. I conceive the rights of the parties, arising from marriage by the law of England, and the maxim of the indissolubility of that relation there, to rest, not on the individual will, or the agreement of parties, but on the law of the country. One proof of this is, that marriage was held indissoluble in England before the marriage act. Another is, that the English apply the doctrine of indissolubility to all marriages, wherever celebrated, by whatever forms, and in whatever words. The same principle, of holding the rights of the parties arising from marriage to be regulated by the law of the country, holds in Scotland. A Scotch Court would not regard an agreement that the marriage should not be dissolved even for adultery.

“It is a natural consequence of the intercourse taking place among civilized nations, that the Courts of law of one country must often feel themselves called upon to enforce rights arising in another, and, in doing so, to judge of and give effect to such rights, not according to the laws of their own country, but according to those of the country in which they had their origin; though they can only be bound to do so in so far as is not prejudicial to the legal policy of their own. On this last ground, questions respecting land rights are judged of by the law of the country in which the lands lie. But it may often be just and expedient to give effect to the laws of the foreign country, with regard, not merely to the constitution of contracts, and many of the claims arising from them, but, in general, with regard to all personal rights, and, among others, to the civil claim of reparation arising from injury or crime.

“Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coeval with, and essential to, the existence of society; while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character altogether independent of the will of parties.

“When such a question as the present occurs, in judging what law ought to be applied to its determination, it is important to consider, not merely the place where it arises, but the nature of the right sought to be enforced, and the situation of the parties. This is not an action for obtaining implement of a marriage;—quite the reverse. It is an action for its dissolution. And the wrong on which this action is founded was committed in this country. We might perhaps apply the remedy of our law, even if the wrong had been committed in another country; but the case is much stronger when the wrong has been committed in our own.

“In this case of Edmonstone, the defence is, that the marriage was contracted in England. But, though the form of the constitution of this relation must be judged of by the *lex loci contractus*, we must look for the obligations resulting from it, to the place where the contract is to take effect. Here the marriage was contracted by parties occasionally in England, but whose permanent and natural residence was in Scotland, and who, accordingly, soon after the marriage, came to Scotland. This is truly a Scotch marriage.

“I have already expressed my opinion, that the rights arising from the relation of husband and wife, though, taking their origin in contract, have yet, in all countries, a legal character, determined by their particular laws and usages, altogether independent of the terms of the con-

tract, or the will of the parties at the time of entering into it. Even had the parties been natives of England, and resident there at the time of their marriage, if they afterwards came, from the acquisition of property, engagement in business, or otherwise, to acquire such a permanent residence in Scotland, as these parties have confessedly done (though I would give no such effect to a transient and occasional residence), considering them as, from that residence, subject to the law of Scotland, I should certainly hold, that that law must regulate the duties and rights arising from their standing in the relation of husband and wife. And in that view I should hold, that the English maxim of indissolubility in the case of such parties, permanently resident in Scotland when the action was brought, and the adultery stated to have been committed, could be no ground for our Consistorial Court refusing to sustain action concluding for that remedy which our own law affords to the injured party. And still less can there be ground for their doing so in the present case, where, though the marriage took place in England, yet, as it took place between natives of Scotland, during a residence merely transient and occasional, it must, in the contemplation of law, be considered as a Scotch marriage.

“We enforce foreign law when it is not injurious to the interest of our own country. But the rights founded on the relation of husband and wife, constitute a very important part in the internal constitution of a state, and one with respect to which we ought not to surrender our law to that of our neighbours. And in this case we have this farther reason for refusing to do so, that we thus apply the law of Scotland to parties who, at the time of the marriage, meant to reside in Scotland, and defeat an attempt to defraud and to elude it.

“Certain proceedings, in the cases of Lolly, and of Lindsay against Tovey, seem to have excited alarm. In the case of Lolly, an Englishman, divorced in Scotland, and marrying again in England, was, by the Twelve Judges, found guilty of bigamy. But, in that case, those learned persons had no occasion to look farther into the international law, than for that particular case. Lolly was making an engine of the law of Scotland to defeat the law to which he was properly amenable. I presume the Judges did right in that case. But I draw no inference from it as to their opinion on the general point. In the case of Lindsay, when the marriage might prove to be an English marriage, and when it was not from actual residence, but merely on the ground of a constructive legal domicile, that the defender was held subject to the jurisdiction of the Scotch Courts, even when the action was brought, the House of Peers properly remitted it to this Court for reconsideration. But nothing which passed in that case can be held as decisive of the present question.

“There is a material distinction between the case of Edmonstone and the other two cases. In these two cases an attempt is made to defraud the law of the foreign nation by ours. I do not think that, where an Irish couple come to this country for a few weeks, their permanent condition ought to be regulated by our law. I view the case of Forbes, though the marriage was contracted in Scotland, in the same light as the case of Edmonstone. The parties came to Scotland in order to marry, and immediately to return to Ireland. That is to be held an Irish marriage.

“As to the domicile necessary, there is a difference between a perma-

ment *bona fide* residence, and a short residence for the purpose of founding jurisdiction. What residence shall be held necessary to regulate *status*, depends, not merely on the time, but on other circumstances. There is a distinction, in this point, between claims of pecuniary reparation, or such rights, founded on contract, as are left to be regulated by the terms of the contract and the will of parties, and questions respecting those rights which are the natural and legal consequences of personal relations, though constituted by contract.

“*Lord Glenlee.*—This may be viewed either as a *quæstio status*, or as a question upon a contract; though I rather think it is the former.

“A contract entered into according to the solemnities of the law of the place is recognized in this country. But, if any thing is craved to be done by the Courts of this country; *de die in diem*, upon such foreign contract, which is contrary to our law and *contra bonos mores*, it will not have effect given to it. In the same way, in questions of legitimacy, or the like, we treat foreigners as we treat our own people, if the marriage was contracted according to the law of the place. But, if we do not acknowledge the *status* claimed, or acknowledge it only to a limited extent, the foreign party would only get execution according to our law. We would not imprison a married woman in Scotland for debt, wherever she was married, though she might have been imprisoned by the law of the country in which she was married. In general, we pay attention to foreign *status* on the ground that, if those things, or the equivalents of those things, which have constituted that *status* in the foreign country, had been done here, they would have constituted that *status* here; and, where this does not hold, we do not acknowledge the *status*. We would not acknowledge a foreign marriage not allowed here. If, for instance, an adulteress divorced in Scotland, should marry the adulterer in England, I think that a son of that marriage would not exclude a daughter by the previous lawful marriage. At the same time, if there had been a divorce in Prussia for adultery, a marriage between the adulterer and adulteress might be lawful here, because the act 1600 had never attached to their case to prevent such a marriage.

“The question of the dissolution of marriage depends upon much the same principles as whether a marriage shall be held to be valid or not.

“Taking it as a question of *status*, why should the rights and legal remedies of the parties stand upon a different ground, according to the country in which the marriage was constituted? We give the remedy of divorce for adultery, because the parties are husband and wife, and not with relation to the constitution of the marriage.

“Even supposing it merely a personal contract, we come to the same result. In general, foreign contracts are acknowledged by our law. In such contracts, a claim is sustained in the Courts of Scotland for indemnification for failure in performance, or to compel performance *de die in diem*. But, if we suppose a foreign contract not acknowledged by our law, we would distinguish between action for failure in the foreign country, and action to compel performance here. In some countries a game debt may be obligatory. If such a debt, contracted in such a country, were sued for here, we would decern for it. But, suppose that a gaming copartnery were established, if that be allowed in any country, in an accounting between the parties, though we might decern here for sums which fell due before the adventurers came to Scot-

land, we would not decern for profits arising in Scotland, *e. g.* for bets at races in Scotland.

“Upon these principles, I have no doubt that the pursuer, Mr. Edmonstone, is entitled to apply to the law of Scotland for redress, particularly as the wife belongs to Scotland.

“With regard to the other two cases, I have no doubt, on the other hand, that the action of divorce ought not to proceed in them. It is true the contract was, in these cases, entered into in England. That, however, is of no moment, if the parties be truly domiciled in Scotland at the time of the action. But the objection is, that neither of these pursuers is in circumstances to apply to our Courts for our remedy.

“Foreigners are not entitled to demand judgment on matters not meant to be explicated here, but elsewhere. As to questions of debt, we go as far as we can to recover a claim by one foreigner against another, if we can attach the debtor's goods *jurisdictionis fundandæ causâ*. But, even in such questions, our interference in the case of foreigners has limits. Suppose two foreign merchants come to Scotland, having involved accounts against each other; that the one brings an action of accounting against the other in this Court; that they then both leave Scotland with their goods, and appoint mandatories to carry on the action in their absence; I doubt whether we could continue to entertain their action. In like manner, I doubt much whether we could sustain action by a French butcher, or other tradesman, against one of the French emigrants whom we had in this country, for contractions made in his own country after his return to it, founded upon an arrestment of some trifling article which he had left behind him here. But, viewing this as a question of *status*, it is very extraordinary to bring an action in this country, in order to ascertain a *status* to be held in another country. For instance, in the case of slavery, if the slave be in this country, we would not suffer him to be treated as such; but, if the master should be domiciled here, we could not sustain action at the instance of the slave, who was resident in the West Indies, carried on by his mandatory, for declaring his freedom. Now, these two pursuers have no prospect of residing in Scotland; and what title have they to insist here to ascertain a *status*, which they have no prospect of applying in this country? I will not pretend to set down the precise limits of the circumstances which would make such an application competent, as domicil, prospect of residence, &c. But these two are extreme cases. The parties have no connection with our laws. Their object is to live as unmarried persons in England. On the mere possibility of their coming to this country at some future period, I do not think we ought to interfere with the law of another country. If a Scotch couple were to disagree here, and to go to France to get themselves divorced for incompatibility of temper, and to be divorced accordingly, and then to come back to this country, and to be married to other persons; in a civil question as to the validity of these new marriages, I would not hold them good, as, in the circumstances of the parties, the law of France ought not to have been applied to regulate their *status*.

“I therefore think the judgments of the Commissaries right in the cases of Levett and Forbes.

“As to the domicil of the defenders in these two cases, a residence of

40 days does not seem enough in such questions, though it is so in ordinary civil actions.

“ *The Lord Justice-Clerk.*—The question to be determined in reference to the decision of the three cases now before us, is of deep importance to the law, as well as to the parties concerned, from the aspect which it has assumed, from the manner in which it has been treated, from the disquisitions in law to which it has given rise, and from the consequences which may follow from it to many, besides those immediately concerned in it.

“ From the first, it appeared to me to require the most deliberate attention.

“ When the power of the Consistorial Court of Scotland to divorce *a vinculo matrimonii* between parties who had been married, or were supposed to have been married, within the operation of the law of England, was first remitted for reconsideration by the House of Lords, in the case of Tovey and Lindsay, I suggested, that it should be deliberately considered, and, with a view to taking the opinions of our brethren. That case was terminated by the death of the pursuer.

“ The point was again brought under notice in the case of Gordon and Pye, though under the unfavourable circumstance of being coupled with another question, viz. the right of the public prosecutor to appear as a party; and the same course of deliberate and thorough inquiry was proposed.

“ But the present cases having in the meantime occurred, in one of which, the judgment of the Commissaries was directly challenged, and supported by two parties anxious for a decision, and the other two cases being also advocated at the same time, though the defenders did not appear, they were made the subject of a hearing, ordered before the whole Court; which led to a most able and learned argument. Thereafter, memorials were ordered on the whole case, on which, after receiving the opinion of the ten other Judges, consulted on a general question of law, we are now to decide.

“ It is necessary for deciding these cases to keep the peculiar circumstances of each in view. [His Lordship stated the circumstances.]

“ In proceeding to state my opinions upon these several cases, I have to observe, in the first place, that, in reference to all of them, the reservation of qualification in the deliberate and unanimous opinion of the consulted Judges, appears to me to be a most indispensable preliminary. That there must be an undoubted jurisdiction over the parties who are called in such an action, arising from residence or domicile; and that there must be no collusion between the pursuer and the defender, either established by direct evidence, or necessarily arising out of the circumstances of the case; that there must not appear the slightest indication of an improper understanding between them, or any want of complete *bona fides*, when founding on the wrongs committed within Scotland as a ground for divorce; are views, that, under every aspect of these cases, have appeared to be indispensably requisite.

“ In the case of *Edmonstone*, the jurisdiction of the Commissaries is fully and distinctly acknowledged. Indeed, if the parties in that case are not amenable to it, it is impossible to say who are.

“ With regard to the case of *Levett*, the facts, as appearing from the proceedings already noticed, are a sale of a house and property in England, followed by a long continuance of residence in Scotland, for

months, if not for years, and accompanied (as I understand) by personal citation. On what ground it could be urged (but I see not even a doubt of it), that a foreigner had not thereby acquired a domicil, so as to render him amenable to any Scottish jurisdiction, it seems difficult to imagine.

“In regard to the case of *Mrs. Forbes*, in the same way, it is stated, that her husband, who had been in the army, had, previous to citation, resided for a considerable time in Scotland. And, though doubts of different descriptions, as to the purpose of such residence, seem to be laid as the basis of the judgment of the Commissaries, yet the fact of its being sufficient to constitute a domicil, to the effect of establishing ordinary jurisdiction over him, does not seem to be controverted, nor can legally be so. This is settled in the opinions of the jurists. “*Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur sive in perpetuum, sive ad tempus ibi commorentur, per l. 7, § 10, in fin. de interd. et relig.*” And Mr. Erskine lays down the same doctrine, book i. tit. i. § 22; “Nor are they (laws) obligatory only upon the natural subjects of the state by birth, but likewise upon *those who are merely temporary subjects by residence*, for the civil rights even of *foreigners*, must be determined by the laws of that country where they reside for the time.”

“Now, if such is the actual fact with regard to all of these parties, that, at the dates of their regular citations, they were amenable to the Courts of law of this country as well *ratione domicilii*, as *ratione actus vel delicti*, and if no evidence of improper collusion has either been adduced, or appears necessarily to arise out of the circumstances of the case (and none have been condescended on), the next inquiry is, have the Commissaries done right in dismissing their several actions as incompetent?

“The defence maintained to be valid in regard to two of these cases is, that the marriages sought to be dissolved were contracted in England, and that, as that union is there indissoluble, except by an act of the Legislature, the *lex loci contractus* must rule the decision, and our Consistorial Court cannot pronounce decree of divorce, although the parties are clearly amenable to its jurisdiction, and the wrong, for which the remedy is sought, was committed within its territory.

“In the third case, though the marriage was *de facto* celebrated in Scotland, and by a Scottish clergyman, yet, as the domicil was truly at the time in Ireland, it has been dealt with as a marriage there contracted, and the same judgment in effect applied.

“On the fullest consideration that I have been able to give to this question, I have formed the same opinion as the ten Judges whom we have consulted.

“In submitting the general grounds on which it rests, I think it unnecessary to enter into any extended disquisition with regard to the peculiar nature of the relation of marriage. Such inquiry appears to be of importance to the determination of the present question, in so far only as it establishes, that the relation of married persons, when viewed as a contract, is one *juris gentium*, creating important consequences as to personal *status*, and conferring many important rights on the parties, which are entitled to the protection of all civilized states, “*quatenus sine prejudicio indulgentium fieri potest.*”

“It is, however, a contract *sui generis*, and, as constituted on the

basis of a "*consortium omnis vitæ divinarum humanarumque rerum communicatio*," it possesses attributes that do not belong to an ordinary contract.

"It is when viewed under this aspect that it appears to me to be unsafe to apply to this contract, which constitutes such important relations, the same maxims and principles of international law that are applied to contracts of an ordinary nature.

"In every question with regard to the constitution of the relation of marriage, and which is in reality a question of fact, we must necessarily be led to inquire what is the law of the place where it was entered into, and to give it effect. But when the relation is clearly established between parties who are resident within the territory of the competent Court, and when a complaint is made of a breach or violation of that contract by acts or wrongs committed within that territory, and when redress is sought for, it is altogether a different question, whether that remedy which the law of the domicil, as well as of the delict, affords to all others, is to be denied, and the parties thrown back, because the law of the contract does not authorize it.

"That the other relations affecting *status personarum* are not so dealt with, even when they are supposed to be bottomed on contracts perfectly lawful where entered into, is clearly evinced by the principle of the decision in the case of Knight and Wedderburn, which denied all effect to the relation between the master and slave, or obligation for service for life, although perfectly warranted by the law of the British colony from which the parties had come, on the clear and obvious principle, not only of the injustice of the contract, but its repugnance to our laws and institutions.

"In like manner, there cannot be a doubt, that if, in regard to the relation of parent and child, there existed in any modern state any institution similar to the *patria potestas* of that of Rome, the natives of such state would not be permitted to exercise here that which might be lawfully used as their privilege at home. And so in the case of guardian and ward.

"On what grounds, then, is it to be maintained, that, in reference to the relation of marriage, and particularly in a question with regard to the fundamental violation of it, a different principle of decision is to be applied?

"Such question, when raised for a dissolution of marriage, is in fact a *quæstio status*, and, if other questions of *status* are dealt with according to the law of the domicil, why is a different principle to be applied here?

"When the marriage is undeniably established according to the law of the country where it was entered into, it must entitle the married parties to the same rights and privileges in this country (when amenable to the jurisdiction of its Courts of law), as are enjoyed by its own inhabitants, as to all civil rights, agreeably to the clear opinion of Erskine, already referred to.

"The duties arising from the state of marriage, are not at the arbitrary disposal of the parties themselves, but are due to the community and society under whose laws they live.

"To suppose that persons coming within the territory of a different state, import amongst with them the whole peculiarities of the law of their own, and are entitled to insist on having effect given to them there,

however repugnant they may be to the law of the country of their residence, is contrary to every rational principle of general jurisprudence, and has not been shown to be supported by any state in questions of this nature.

“But to come closer to the argument of the defender, it is said, that, as marriage by the law of England is indissoluble, and hers was contracted and celebrated there, it must be judged of by our Consistorial Court (though possessing jurisdiction), by the *lex loci contractus*, and, that the law of Scotland, which authorizes the granting of divorce *a vinculo matrimonii* on account of adultery, cannot apply.

“This position is supported on what are maintained to be the principles of international law, as well as of the *comitas* that is due from one independent state to another.

“The defender states, in point of fact, that no marriage can be dissolved in England on account of adultery, by any Court of law, it being only competent by an act of the Legislature, and that all that the Consistorial Court can do is, to pronounce decree of divorce *a mensa et thoro*; and, in support of this statement, reference is made to the late decision of the twelve Judges in the case of Lolly.

“It is farther said, that, by the express words of the marriage ceremony in England, parties agree to an indissoluble union “till death do them part.”

“With regard to the fact, what is the law of England, I am not at all moved by the argument of the pursuer, that the proceedings in Parliament relative to a divorce bill are to be viewed as of a judicial nature, or as if the Legislature acted as a Court of law, as the relief it affords cannot be obtained by judicial process in that country. A law is, in fact, made for each particular case.

“But it is material to observe, that the application for such relief proceeds always on the statement, that the party complained of has, “by her adulterous behaviour, dissolved the bond of marriage on her part.”

“In the same way, the relief or remedy granted in Doctors’ Commons proceeds on the same principle, when it decrees a perpetual divorce *a mensa et thoro*. This is, no doubt, short of the remedy which our law has, for a long period, granted on account of similar wrongs. But it is evident that both laws proceed on the fundamental basis, that there has been a total breach or violation of the contract by one of the parties.

“The position, then, that marriage is, in England, indissoluble, in every sense of the term, or rather that the union of husband and wife is, from the very nature and terms of it, to last till death shall them part, cannot be received without the qualification above noticed.

“That the words of the ceremony are entitled to no regard, as creating any personal agreement or covenant that a dissolution of the union, or even a divorce *a vinculo matrimonii*, in the event of adultery, shall never be sought for, is obvious, from various considerations. 1. It is impossible to suppose that such an event at all enters into the contemplation of parties. They can mean nothing more than to enter into the obligation as constituted by law, and never look to the event in question. 2. The competency of suing for and obtaining divorce *a mensa et thoro*, is not in the least affected by the alleged personal engagement, while the nature of that remedy, by putting a final termination to the whole of

the matrimonial relation (short only of conferring the power of marrying again), is entirely inconsistent with the vow of perpetual union till death shall them part, so much relied on by the defender. Parties no longer cohabiting are finally separated. 3. And, at any rate, the undoubted right of applying for a total divorce to Parliament shows that there is no bar created, by the nature of the personal contract of parties, to the obtaining the full redress afforded by our law, as the Legislature can never be presumed to grant that redress from which a party was precluded by positive contract.

“The result, then, of this state of the law of England, which is a municipal institution, resulting from national policy, is merely this, that, for the grievous wrong sustained by this fundamental breach of the marriage contract, redress of a limited nature only is afforded by its Courts of law, and that a total dissolution of the union of the married pair may be obtained by act of Parliament.

“But, if the parties should afterwards enter into this country, and become amenable to its jurisdiction, the Courts of which are *de jure* entitled to decree a total divorce for adultery committed within its territory, there is, in my opinion, no principle short of the surrender of the supremacy of our own law upon which the redress that is competent to its own inhabitants can be withheld.

“This appears to be the fair view of this relation, whether it be considered as a contract affecting the *status personarum*, or as one of an ordinary nature.

“As to the first, it clearly appears, that the state of any person is, and ought, according to the authorities referred to by the pursuers, to be determined by the laws of the country of his residence. When a violation of the contract that affects it is complained of, it must be judged of by the law of the place of residence of the violator and of the wrong done.

“No private agreement or convention of parties can affect the rights resulting from the relation of marriage. And I apprehend it to be equally clear, that parties who have contracted the relation of marriage in a foreign country, when they take up their residence here, must have their rights regulated by the law of Scotland, and not by that of the foreign state.

“It would be strange, indeed, if a Scotch man and woman, married at Berlin by a regular clergyman of that Protestant country, and according to the forms of its church, should, on their return to Scotland, be entitled to maintain that their rights, particularly in reference to divorce, must be regulated not by the laws of this country, but by those of the Frederician code, and that either party might sue for divorce in the Commissary Court, on the endless variety of whimsical and absurd grounds contained in it. This, however, would be the necessary result of giving effect to the *lex loci contractus*. But, how it could be carried into execution, it is impossible to conceive.

“But, it has been said, that a contrary doctrine would lead to English or Scottish marriages being dissoluble in France or Prussia, on the endless variety of grounds there permitted; the consequences of which would be most pernicious.

“I apprehend, however, that this view is not correct; because it is ever to be remembered, that our right to divorce *a vinculo matrimonii* for adultery, and the limited divorce *a mensa et thoro* in England, as

well as the total dissolution by act of Parliament, proceed entirely on the absolute breach of the contract or bond of marriage.

“In so far, therefore, as a divorce obtained in another country does not proceed on that basis, it by no means follows that it could or ought to have effect either here or in England, as such divorces are avowedly permitted on grounds wholly different from the actual rupture of the contract. We would admit the validity of the Prussian marriage; but, as to the rights of parties arising from it, or wrongs committed by either of them, we would deal with them according to our own law.

“Viewing marriage only in the light of an ordinary civil contract, and holding that there has been a total violation and annihilation of it by one of the parties, it does not follow, on any fair principle of international law, that the remedy for that wrong, or the species of *actio injuriarum*, that is founded on it in our action of divorce, ought entirely to be regulated by what would be the remedy in the place of the contract; for it is well known, that, in the case of an ordinary action of debt or obligation, or action for breach of contract, redress, when sued for in Scotland, will be afforded according to our own law, and not according to that of England alone, *quoad* execution and diligence.

“When under the jurisdiction of our law, execution and diligence will be awarded against a party in a way totally different from the practice of England. Inhibition and arrestment would follow. The diligence will be extended to the heritable estate here, though not in England. It will be allowed to operate against both the person and the estate, though otherwise there, as solemnly determined in the case of Lashley against Moreland and others, 21st December 1809; and, as well argued for the pursuers, every defence competent against a Scotch obligation may be constantly pleaded against an English one, such as compensation, retention, or the like.

“The law of England gives that which, according to its own policy and institutions, it can give; while, in reference to identically the same obligation, our law applies its own rules and system of execution.

“There is another exception, noticed in the pleadings, as laid down by Lord Mansfield and Huber, viz. where the parties had another law in view than that of the *locus contractus*.

“There seems, therefore, no sound principle for denying the application of our own institutions to the case now under consideration; on the contrary, as it involves a question of *status*, it seems peculiarly entitled to the benefit of them.

“It is not, indeed, denied, that, in so far as adultery is viewed as a crime, the person guilty of it within our territory is amenable to our criminal courts; yet, why might not he urge that the law of his contract attaches no criminality to it? But a distinction is attempted between such a case and the civil action of divorce, which is said to arise to the innocent party as a privilege.

“Without dwelling on the circumstance, that this action always rests on a grievous personal wrong, and that the concurrence of the Fiscal of the Commissary Court is necessary to its institution, it must be observed, that there are other civil actions consequent on the commission of crimes, under which the guilty foreigner would unquestionably be liable in our civil Courts, whether it was sanctioned by the law of his own country or not. The crime of homicide may give rise to an action of damages and assythment; and I apprehend there cannot be a doubt that an Eng-

lishman would be bound to answer to it here, although such action is unknown in England. And various other instances might be figured. Why, then, is a prosecution for divorce on account of adultery to be held as in a different situation?

“If the principle of alleged international law contended for is, in reality, well founded, we should naturally expect to see it acted on in all other countries, and particularly among our enlightened neighbours in England. But there, we find, in regard to this very relation of marriage, a course of proceeding adopted entirely inconsistent with giving effect to the *lex loci contractus*.

“1. While the validity of Gretna Green marriages is, in England, held unquestionable, though in direct violation of the statute, and in defraud of the law established for the inhabitants of its territory, yet the rights and privileges of the married pair are held to be regulated by the law of England, the future residence; in the same way as it was held with us, in the case of Hogg or Lashley against Hogg, 7th June 1791, that, where parties had been married in England, and, after residing there for some time, had come to Scotland, and acquired a domicil, the right of the children to legitim, upon the death of the husband, must be determined by the law of domicil. The same would have been found in the question between the same parties, 16th June 1795, as to the widow's *jus relictæ*, if it had not been barred by a special agreement.

“2. It is notorious that, though natives of Scotland who have married here, and afterwards lived in England, were to sue for that remedy which would be competent in their own country, on account of the violation of the contract, yet it would not be afforded by any English Court of law. But, notwithstanding the constitution of such Courts, that would seem as competent as the demand here of a divorce *a mensa et thoro* for adultery. The rights flowing from the marriage of such persons would all be regulated by the English law.

“These are examples sufficient to show, that effect is not universally given to the *lex contractus* in the way contended for by the defender.

“But, it is urged, that, on the ground of *comitas*, or that deference which one independent state owes to the institutions of another, our Consistorial Court, though possessing the competent jurisdiction, ought to deny the remedy of our own law, because it would not be afforded in England to the same parties suing there.

“Upon this part of the case, as well, indeed, as in every other part of it, great learning and research have been evinced, both by the Bar and by the learned Judges of the Court below.

“In determining as to the effect that is due to this argument, we are not called upon, nor, indeed, are we entitled, to give any opinion as to the wisdom and expediency of our own institutions in this department of law, in comparison with those of England, or to decide the question, which are most consonant to the principles or precepts of Christianity. The field of expediency is wide. And, whether it is wiser and more advantageous to the community to permit a total dissolution of marriage, when a fundamental violation of it has taken place, and thereby both to punish the offending, and to relieve the injured party, or to grant only the limited remedy of a perpetual separation, thereby annihilating the purposes of the one union, without affording

the power of ever forming another, is certainly a question upon which it is possible that different opinions may be entertained.

“It appears to me to be sufficient to the decision of the question of *comitas*, that it is laid down by all writers on the subject, that one state is not bound to follow the law of another, if it is prejudicial to its own system of laws and policy, or to the rights and interests of its own subjects. The law of the foreign state must be *innocuæ utilitatis*, and is only entitled to support “*quatenus sine præjudicio indulgentium fieri potest,*” or, “*Rectores imperiorum id comiter agunt ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium, præjudicetur.*” It is unnecessary to refer to the other authorities that have been adduced in the papers, in support of this most reasonable and universal rule.

“Now, the law of Scotland, in regard to divorce, on account of adultery, at least must be held as adopted by the state since the period of our Reformation;—from views of its sacred origin;—its wisdom and utility in reference to public morals and happiness;—and as the proper means of affording redress for grievous wrongs (which our criminal law has raised to the rank of heinous crimes,) and of deterring, by the disgrace it occasions, from the commission of similar offences.

“In this view, it seems impossible to maintain, that it is a matter *innocuæ utilitatis* to abandon altogether our own law, and to give effect to that of a neighbouring country, which proceeds upon a principle altogether different.

“Again, can it be justly said, that it would not be prejudicial to our own inhabitants, to see whole classes of strangers living openly in defiance of that law which binds them? Or, is it not the greatest possible hardship on the pursuer, Mr. Edmonstone, to measure out to him, not the law of his own country, but one that cannot afford him the redress to which every other married Scotsman is entitled?

“It would lead to the necessity of determining every question of right arising out of marriage, according to the rules of a law unknown here, and for expounding which no court exists within our territory.

“No regard to *comitas* has ever been shown by us in regard to attempts to settle heritage by English wills, however clearly manifested, and valid *lege loci*.

“With regard to the course of decisions, while there are many that have been pronounced in the Consistorial Court, in conformity with the view which I entertain, there are none that appear to have been decided in this Court that can fairly be urged as direct authorities against them.

“It is needless to enumerate the cases referred to in the papers, in which judgment of divorce has been pronounced on account of adultery committed in Scotland, in reference to English marriages.

“There is one earlier, in which the marriage, though celebrated in England, was dissolved here, viz. the late Lord Eglinton’s; and there is a still more early case, that of Major Urquhart, where the marriage was celebrated in America.

“In the case of the Duchess of Hamilton, the divorce was afterwards followed by her marriage with an English nobleman, which was never heard to be questioned in that country.

“It has been said, however, that the case of Wallace and Brunsdone is an authority against the validity of such divorces. I have been at

pains to peruse the arguments in that case, and, though there are, no doubt, passages to be found in which the argument of the defender is urged, and though the learned reporter states, "that the majority of the Court seemed to be of opinion, that there was a *forum ratione originis*, so as to found a jurisdiction in the Commissaries, but that it was not competent for them, *in the circumstances of the case*, to pronounce a judgment of divorce between the parties," it cannot be said that the case was determined on any such grounds as occur in the present. It was treated by the pursuer as a question of jurisdiction; and, though it was argued on the other side both as such and on the merits, there were too many specialties to make it apply here. In the papers for Sir Thomas Wallace, it was held as clear law, that, as to Englishmen and other foreigners, who have taken up their residence in Scotland, they are to be dealt with, *quoad* marriage, just as that law requires, and without regard to the law of their own country; while it is expressly stated, that, as to the defender, all the requisites that make jurisdiction be attended with legal execution were wanting, neither his domicil, nor property, nor person, being within the territory. In Sir Thomas Wallace's answers, the marriage is described as one contracted in England betwixt persons whose established residence, both before and after the marriage, was in England, and who, at no one period since the date of the marriage in September 1783, had resided in Scotland. The decision, in that case, cannot, therefore, rule the present.

"Upon the whole, as to the case of *Edmonstone*, there cannot be a doubt, that the judgment ought to be altered.

"As to the case of *Levett*, as jurisdiction is established by a residence within the territory of Scotland, accompanied by citation given personally, and the fact of the alleged acts of adultery having been committed here, I am, for the grounds stated, also for allowing the action to proceed, as the fact of the marriage having been celebrated in England appears no valid defence; it being always competent to detect, by all legal means, any collusion between the parties.

"With regard to the case of *Mrs. Forbes*, holding the jurisdiction to be equally well established as in the last case, the competency of the action cannot surely be less apparent from the marriage having been celebrated in Scotland, whether upon a transient visit only or not. There arises no legal presumption against such a marriage, any more than there does as to Gretna Green marriages, which are every day acknowledged in England, because valid in the *locus rei gestæ*; and the effect which is given to such affords a strong argument in regard to the objection of fraud, which is supposed to attach to the parties to a Scotch divorce.

"With regard to the apprehended *conflictus legum*, from the judgment about to be pronounced, which is rested on the proceedings in the cases of Tovey and Lolly, whether it is real or not, it cannot influence us, deciding, as I trust we are about to do, according to the law of Scotland.

"The doubts expressed in the case of Tovey have been attended to with all due respect. And though the case of Lolly, while it was one attended with peculiar circumstances, did produce an opinion from the Twelve Judges of England, 1<sup>st</sup>, That a marriage contracted in England was not to be dissolved by any decision of any court either in England or abroad, but by the authority of the Legislature alone. 2<sup>d</sup>, That the

exception in the Statute 2d of James I. c. ii. as to divorce by sentence in an Ecclesiastical Court, related only to Ecclesiastical Courts in England, we may yet hope, that the Court of the last resort may think that the judgment pronounced here is, at least, deserving of fair and deliberate consideration. And, when so considered, we know the decision will be in safe hands.

“In the case of Edmonstone, the Lord Ordinary (5th March 1816), by the unanimous advice of the Court, remitted to the Commissaries “to alter the interlocutor complained of, to sustain the action, and to proceed therein according to law.”

“And the Court (7th March) refused a short reclaiming petition without answers.

In the cases of Forbes and Levett, *Lords Glenlee, Bannatyne*, and *Robertson* (the *Lord Justice-Clerk* dissenting), proposed (5th and 9th March) a remit to the Commissaries for farther inquiry as to the domicil. *Lord Robertson* thought it unnecessary to inquire as to the domicil of the pursuers. *Lords Glenlee* and *Bannatyne* were of a different opinion. The Court being equally divided as to the necessity of inquiring into the domicil of the pursuers, the case stood over for the opinion of Lord Pitmilley, who (29th May, 1st June 1816), upon the ground, that, supposing there was no collusion, the Courts of this country were bound to give their own redress, without regard to the alleged chance, or even certainty that the pursuer meant to establish a *status* to be enjoyed in another country, and, particularly, that in these two cases, the pursuers were wives, whose domicil, except in the case of regular separation, follows that of the husbands, was of opinion, that it was not necessary to inquire into the domicil of the pursuers.

“These two cases were therefore (1st June 1816) remitted to the Commissaries, with instructions “to recal their former interlocutor, to allow the pursuer to prove that the defender was domiciled and resident in Scotland when the action was raised, and also to make what inquiry they may think proper and competent, in order to ascertain whether the present process be collusive, and thereafter to proceed according to law.”

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Note (H.) p. 387.

In the canons of the Councils of Perth, held in the 13th century, and published by Lord Hailes, there is nothing upon the subject of divorce for adultery. But in the earliest genuine authorities of the Scotch law which have been preserved, the distinction between the greater divorce *a vinculo matrimonii* and the lesser remedy of separation *a mensa et thoro*, seems to have been clearly drawn, and both of these modes of redress likewise appear to have been recognized as lawful. Thus, in the act of the fifth Parliament of Queen Mary, cap. 19, dated 1st February 1551, “It is statute and ordained, that quhat-sum-ever person maries twa sundrie wives, or woman maries twa sundrie husbandes, livand together UNDIVORCED LAUCHFULLIE, contraire to the aith and promise made at the solemnization and contracting of the matrimonie, and swa ar of the law perjured and infamous; therefore, that the paines of perjury be execute upon them with all rigour,” &c. Consequently, it is plain, that no guilt or penalty of perjury was held to be incurred likewise by the second marriage of such persons during the lives

of those to whom they had been first married, if they were lawfully divorced. In other words, the divorce *a vinculo* was then recognized in Scotland by the Legislature as lawful.

The immediately following statute of the same Parliament, which subjects notour adulterers to the pains of rebellion in case of disobedience to the sentence of the spiritual jurisdiction, likewise evidently admitted as an exception the dissolution of the marriage by previous lawful divorce.

The act of the 9th Parliament of the same sovereign, cap. 74, anno 1563, which punishes notour adultery with death, "als declaris, that this acte on no wise sall prejudice onie partie to *pursew for divorcement* for the crymes of adulterie before committed, conforme to the law."

Before the date of the Reformation, there is evidence too, that both kinds of divorce were recognized in the judicial proceedings of the Courts of common law in Scotland. Thus, Sir James Balfour, who was one of the original Commissaries, and afterwards Lord President of the Court of Session, refers in his *Practicks*, p. 99, to the case of Janet Auchinleck against James Stewart, 18th December 1540, which has been examined in the manuscript record of the acts of the Lords of Council, Vol. XIV. folio 58, from which it appears, that the pursuer in that case instituted an action of removal against her husband from her jointure lands, "Because, of the common law, when ony man and his spouse are divorced *SIMPLICITER*, or *frae bed and buird thro adulterie* committed be the man, as in this case, the haill tocher gude, and all that was gotten be the man frae the woman be virtue of the matrimonie contracted and solemnized betwixt them, ought to be restored to the woman again, with the profits thereof, after giving of the sentence of divorce betwixt them." The fact of the divorce being proved, the judgment accordingly "decerns and ordains the mails, farms, profits, and duties of the same, to pertain to the said Janet for her lifetime, and she to intromit with the same at her pleasure, the said sentence of divorce standing as said is, and that the said James Stewart desist and cease therefrae," &c.

Another case, which appears to be in point, occurs in the manuscript record of "*the acts and decreets of the Lords of Council and Session*," 23d March 1563, folio 235, in the action of Catherine Watson, relict of James Gadderon, burgess of Elgin, "and James Innes, now her spouse, for his interest, against the heirs of her former husband," concluding for possession and removal of them as to certain lands to which she had right in liferent, as relict of her first husband, and against which claim the defenders, "Archibald Gadderon, &c. compeared be Mr. Alexander Skene, their procurator, wha alleged, that the said Catherine Watson can have nae action for removing the defenders frae the twa aughteen parts libelled, in respect that she was *NOUGHT* (not) spouse to the said James the time of his decease, bot was *SIMPLICITER DIVORCED* from him be Sir John Gibson, Commissar of Murray, upon the 27th day of August 1560." After debate, this defence was sustained as relevant, and as the record bears, "therefore, the Lords of Council assign to the defenders the 10th day of May next to come, with continuation of days, *for proving of the said alledgeance*, and to that effect, ordains them to have letters to summons sik witness and probation, and to produce sik writs, rights, reasons, and documents, as they have or will use for proving of the points of the said alledgeance again the said day; and,

in the mean time, continues the said principal matter in the same form, force, and effect as it is now; but prejudice of parties unto the day aforesaid, and the party compearand as said is, are warned thereof *apud acta.*"

From the date of the abolition of the jurisdiction of the Ecclesiastical Courts of the Roman Catholic Church in Scotland by the act of the Estates of Parliament of the 24th August 1560, ratified by the act 1567, cap. 2, of the 1st Parliament of James VI. the Consistorial jurisdiction in cases of divorce seems to have been assumed sometimes by the Courts of the Reformed Church, and sometimes by the Court of Session, till the Commissaries were appointed anno 1569, and in the earliest part of the record of this new Consistorial judicature, there is abundant evidence, that divorce *a vinculo* had continued to be in use for adultery as part of the common law during this interval.

It is sufficient to refer to the case, 26th January 1564, Jerome Hamilton against Elizabeth Sclater (MS. record,) in which the pursuer libels upon a decree of the ministers, elders, and deacons of the burgh of Edinburgh, dated 25th July 1560, finding the defender guilty of adultery, and "decernand (decerning) her *to be nae langer wife* of the said Jerome," and concludes, that, "in respect the said Elizabeth is divorced frae the said Jerome for her own facts, as said is, she ought to be decernit be the said Commissaries to have tint (lost) and to tine (lose) her tocher guid, and all other things given to her or be her, in contemplation of the marriage foresaid."

The decree of the kirk-session being verified, with a special license to that Court, by the Lords of Secret Council, to proceed in the cause, and also the proof of the pursuer, the Commissaries decerned in terms of the libel.

Again, upon the 16th March 1564 (*ibid.*) in the case of Elizabeth Hamilton against John Maxwell of Calderwood, her husband, and Elizabeth Lindsay, his pretended spouse, the Commissaries reduced a decree of divorce *a vinculo*, pronounced by the superintendents, elders, and deacons of Glasgow, on the 6th of August 1563, against Elizabeth Hamilton, the first wife, for adultery, upon the ground that she had discovered, that, before she was divorced, her husband had begot a child in adultery, and that his guilt furnished a valid exemption to her against his action and decree.

In the MSS. record of the acts and decrees of the Lords of Council and Session, an action of adherence is likewise sustained, 19th December 1560, folio 219, John Chalmer against Agnes Lumsden, upon "our Sovereign's letters," for which the reason assigned is, "because there is nae Consistories instant, and the office of the Spiritual Judge, quilks (which) of before was wont to cognosce in sik like causes, now ceases. Therefore, necessar it is, that the Lords of Council put remeid (remedy) thereto."

Again, upon the 26th March 1561, and 30th April 1561 (*ibid.*), Barbara Logan against Roger Wood, action of adherence is sustained, and decree pronounced by the Lords of Council and Session for the same reason.

Also, upon the 2d June 1561, in the case of Jane Lyal against Niell Montgomery of Lainshaw, her spouse, a proof of the pursuer's adultery is allowed by the Lords of Council and Session, as a defence against her action for restitution of conjugal rights.

The “*Carta Constitutionis Commissariorum Edinburgii*,” (Balfour’s *Practicks*, p. 671,) by Queen Mary, conferred upon this new judicature the jurisdiction of all causes and actions relative to marriage, legitimacy, and divorce, arising within Scotland. But it did not alter, in any respect, the law as it before stood, and while divorce *a vinculo* has ever since been granted, in usual practice, on the ground of adultery, by the Consistorial Court of Scotland, the statutes and other written authorities of the Scotch law are silent as to the existence at any previous date of an opposite rule, or as to any change of the law of the kingdom on this head, of which there is not the slightest trace.

It was by special statute that second marriages were prohibited, “of persons divorced for their awne cryme and fact of adulterie from their lawful spouses,” even “with the persons with whom they are declared by sentence of the ordinar judge to have committed the said cryme and fact of adulterie;” and under this limitation, the spouses have been always restored to perfect freedom from the bond of marriage by the divorce *a vinculo* of the Scotch law for adultery.

With respect to the practice of the ecclesiastical jurisdictions of the Roman Catholic Church in Scotland, before the Reformation, a volume of decrees of the official of St. Andrews, in the arch-deaconry of Lothian, commencing about the year 1500, and ending upon the 9th June 1541, and a “*Liber Sententiarum Auditorii Sancti Andriensis Principalis*,” chiefly in cases of appeal, commencing 10th October 1544, and ending 23d September 1553, having been lately recovered and lodged in the Register Office, by Mr. Thomson, the Depute-register; with his permission these have been examined, and have been found to contain a very great number of sentences of divorce *a vinculo*, upon grounds of nullity;(a) but not a single case, in which dissolution of a marriage, held to be originally lawful, for adultery, or any other cause, appears to have been either sued for or decreed.

The negative evidence afforded by this course of decisions, is certainly of considerable weight, as to the practice of the Ecclesiastical judicatures at that period. But there is no opportunity of comparing it with the records of the other jurisdictions of the Roman Catholic Church in Scotland at the same period, or with those of previous dates; neither are the other records of the province of St. Andrews itself now to be found. The policy of the Church of Rome, under the direction of the primate of Scotland, might, perhaps, also, in some degree, account for the want of any case in which divorce *a vinculo* was granted within his jurisdiction, during the fifty years which immediately preceded the Reformation.

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Note (I.) p. 387.

IN the action of divorce, at the instance of Dame Barbara Wauchope, otherwise Seton, against Sir George Seton of Garleton, Baronet, for adultery, instituted in the beginning of the year 1705, the pursuer being of the Roman Catholic faith, omitted the usual conclusion, that their marriage being dissolved, she should be declared “free to marry any other man whom she pleased, in the same manner as if he were naturally dead.” In all other respects her libel was in the common style.

Against this action, it was stated in defence for Sir George Seton,

(a) See Note (M.)

*inter alia*, that the libel was "not relevant, because it hath no conclusion before the will thereof for dissolving the marriage, but only that the pursuer and defender may be separate from one another's society and fellowship; and as an evidence of the meaning thereof, there is no mention or conclusion that the pursuer is free to marry whom and when she best pleases, &c." Yea, it is offered to be proven by her oath, that this is industriously omitted, because she did not mean to have the bond of marriage dissolved. And, consequently, so long as the marriage doth stand, she can never have access to her provisions, as if the defender were naturally dead. *Secundo, et separatim*, She is not *in bona fide*, and cannot be heard to pursue a dissolution of the marriage, because she cannot deny that she is professedly of that principle and conviction, that she cannot pursue or make use of such a dissolution under the pain of an *anathema*, conform to cap. 6, 7, § 24, Concil. Trident. The defender needs not be more explicit with their Lordships on the head; but it is certain, even by the law of Scotland, it is in a party's power, by her consent, to exclude herself from taking the benefit of the law here about divorce; and the pursuer being professedly of such principles, includes manifestly such a consent."

In the answers to these defences, it was observed, that, *esto*, the libel did only conclude for separation, yet, it is without question, that adultery, which is a relevant ground of divorce, is also a relevant ground of separation, as being the *minus* included in the *major*; and it is frivolously captious for the defender thus to distinguish," &c.

To the allegation, with regard to her religious principles in particular, it was further answered, "The pursuer is not here to declare her principles, but doth most lawfully crave the benefit of the law of God, and of the land, against violators of marriage and breakers of wedlock, so that there can neither allegiance nor construction be made, as if she had consented never to pursue for a divorce, which consent she never gave, nor intends to give. Nor ought the defender so far to confess his own wickedness, as to allege any such consent which necessarily implied it."

In the subsequent written debate, the defender again repeated his plea, that "the pursuer neither craves, nor does her religion allow, a dissolution of the marriage, but only a *separatio thoro*, as is clear by the Canons of the Council of Trent, and all the writers on the Canon law, *nam jure pontificio matrimonium nunquam quoad vinculum dissolvitur, sed tantum thori separatio permittitur*; Sanchez de Matrim. Lib. x. Disp. 18, R. 10," &c. To this she answered, "That the argument from the Canon of the Council of Trent is altogether mistaken and misapplied; for, 1<sup>mo</sup>, the chief design and words of the Canon are prohibitory of the innocent party marrying another during the guilty party's life, "innocentem qui causam adulterio non dedit, non posse altero conjugē vivente, aliud matrimonium contrahere; Sanchez de Matrim. Lib. x. De Divortiis, Disp. 2. Utrum ob adulterium alterius conjugis ita dissolvatur matrimonium ut integrum sit innocenti ad alias nuptias transire?" So that the opportune time for obtruding the Council of Trent, if it were of any authority, should be when the pursuer, after she has obtained a divorce, may purpose to enter into a second marriage with another. But this can never hinder the divorce, *primo et ante omnia*, to be pronounced. But, 2<sup>do</sup>, The universal Canon law itself does not reprobate divorce on the head of adultery, as by the cap. significasti, et

cap. ex libris de Divort. And therefore it is, *3tio*, That the later Canons of the Council of Trent are held by Canonists themselves not to be universally binding, but only in *iis locis ubi Concilium Tridentinum est publicatum et receptum*. As Zoes. ad Decretal. Lib. 4, tit. 3, de Clandest. Desponsal. R. 21, *et sequen.* holds, and it cannot be made appear that ever the Council of Trent was received or published by Papists in Scotland."

At the close of the debate in this cause, the Commissaries, upon evidence of the defender's guilt, pronounced judgment in terms of the libel.

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Note (K.) p. 388.

In the bill of advocacy afterwards presented for Mrs. Levett *ex parte*, the main drift of the pleading for her seems to have been to create an impression that the Radical Court was resisting a decision previously given by the Superior Tribunal upon the general question when it had been originally submitted to review.

"By that authority it was" (said to be) "fixed, that, by the law of Scotland, it is no defence against an action of divorce in Scotland for adultery committed there, that the marriage was celebrated in England, nor that the parties had been domiciled there.

"It is further fixed and ascertained, that the only kind of residence or domicil necessary to such action is, that residence or domicil in the parties which is necessary to found civil jurisdiction."

The Commissaries, in truth, had rested their judgment, not upon the domicil at the date of the marriage, but expressly upon the ground "that the pursuer has not established by evidence, that the defender held that **REAL** domicil in Scotland **AT THE DATE OF THE ACTION**, which was requisite to be proved." But it was convenient for the argument of the pursuer to overlook entirely the distinction between the real and the presumptive domicil. To justify this departure from the very constitution of the question, as it had been considered in the Primary Court, it was therefore assumed that it had been previously decided by the opinion of the ten Judges, that the residence or presumptive domicil necessary to found civil jurisdiction only was to be required in such cases. Now, there was no question as to jurisdiction in the original discussion of Mrs. Levett's case. The Commissaries had even expressly sustained their jurisdiction, and had intimated that they would proceed in the action if the conclusions were limited to separation *a mensa et thoro* and aliment. The Court of Session, too, had not then given the decision alleged, or any decision or opinion at all as to the effect of the defender's domicil at the date of the action; or as to the *quality* of that domicil which should be required to support the conclusion for divorce *a vinculo matrimonii*. On the contrary, the record bore that, by the express instruction of the remit, the Commissaries were to allow proof, as to the fact of the defender's domicil and residence at the date of the action, and thereafter to proceed in deciding the case as might seem in their own judgment "according to law," without any further direction.

Such statements, therefore, could not have been hazarded, if there had been any opportunity to confute them, and explain to the Superior Court how the facts really stood.

In like manner, no reference was made by the pursuer in the subse-

quent argument of this bill of advocacy to those reasons which had formed the ground of the judgment brought under review. The action of divorce was indeed there considered as an *actio injuriarum*. . But no attention whatever was paid to the views which the Commissaries had taken of it, as nevertheless purely a civil suit, the conclusions of which did not require the *locus delicti* should be within the territory of the jurisdiction, and were in no way affected, either favourably or unfavourably, by the circumstance of the place where the crime was alleged to have been committed. . According to these views, for example, if a Scotch inhabitant of the village of Coldstream had committed adultery, it could be of no importance to the action of his wife for divorce in the Scotch Consistorial Court, whether the scene of his guilt was in his own village or in the English village of Cornhill, on the opposite side of the Tweed. Nay, unless the course of decisions for time immemorial has been altogether erroneous, the action of divorce, by the law of Scotland, is the very same in every quality and consequence, for adultery of a Scotch husband or wife committed upon the continent of Europe, or in Asia, Africa, or America, as when the crime has been committed in the city of Edinburgh.

Without joining issue upon this view of the point, which the Commissaries had adopted, their opinion was thus considered in the bill of advocacy.

“It is said, that, although the delinquency occurred in Scotland, yet that is of no importance, because the action is pursued *ad civilem effectum*.

“This is also a singular distinction. If an Englishman, by a bond, executed in England, engage to pay money on a certain day, and before that day abscond into Scotland, where he violates his contract, will not the fact, that he is violating his contract in Scotland, be an important circumstance, to induce a Scotch Judge to grant redress? Where, in the name of wonder, ought injustice to be remedied, but where it is committed? Must not the pursuer follow the defender, and must not redress be granted by the Judge who finds the defender within his territory doing wrong?

In another passage, “Consistorial jurisdiction” (it was observed) “is so far different from criminal jurisdiction, that it does not imply the existence of the *potestas gladii* or *imperium merum*. Still, however, it differs from ordinary civil jurisdiction, in this respect, that it takes cognizance of causes, which do not fall under civil ordinary jurisdiction.”

After noticing the division of jurisdiction into civil, criminal, and ecclesiastical, as to the point in question, it was then further remarked, that “the *actio injuriarum* was of old entrusted to the Commissaries, as a matter falling under the jurisdiction of a court of conscience or of religion, whose jurisdiction is neither strictly civil nor strictly criminal. That action, when founded on an averment of adultery, became still more strictly consistorial, from its connection with marriage and bastardy. It is impossible to found any conclusion upon the circumstance, that this process is civil rather than criminal. It is truly a consistorial question, and in all such cases the *locus delicti* creates jurisdiction, because it is in *loco delicti* that religion and good morals are insulted, and it is there that redress is due. Accordingly, that principle prevails to this day in the courts in Scotland, which are strictly ecclesiastical, viz. the Presbyterian Church Courts, which enforce their sentences by spi-

ritual sanctions only." Thus the inference was drawn, that consistorial jurisdiction "can only protect public morals, by giving redress where the crime is committed. The palinode takes place where the scandal occurred, and the divorce must be granted where the guilty party is found committing it."

Now, the action for defamation or scandal here referred to is competent, in the first instance, before the ordinary civil courts of common law, as well as before the Commissaries, and with the very same conclusions, upon the ground, that when pursued for damages or reparation to the private party, it is an ordinary civil action; at least the point was so decided in the case, 4th March 1755, Auchinleck against Gordon; and in the case, 9th February 1765, Wilkie against Wallace, Sel. Dec. Nor does any distinction seem to be made in the practice of the law of Scotland as to the penal conclusions comprehended in this peculiar action. The palinode, or recantation, in actions of scandal, was a peculiar conclusion, applicable to verbal injuries, which is now obsolete. By what rule of analogy then, must the dissolution of marriage by divorce be decreed to take place where the crime of adultery has been committed, as defamatory expressions were retracted by palinode at the place where these had been spoken? Upon what ground is it here asserted, that the action of divorce is entertained by the Consistorial Court to protect public morals, when that action can be sued only by the private party, and for private redress? Where has the authority been discovered for holding, that it is the *locus delicti* which founds *the jurisdiction* in actions of divorce, and that the decree must be obtained there?

With respect to the extremely delicate and difficult point, whether the remedy afforded to foreign parties should be that of separation *a mensa et thoro*, when their own law does not permit divorce *a vinculo*, the argument for the pursuer was stated in this manner:

"Lastly, The Commissaries propose to introduce into this country the form of redress granted at Doctors' Commons, viz. to divorce, but not to declare the *vinculum matrimonii* dissolved.

"The complainer humbly apprehends, that the Commissaries have no power in this way to alter the practice of the law of Scotland, and to introduce the law of England. A court of law has no other duty than to administer the law, and has no right to alter the institutions of our forefathers; and for what beneficial purpose would they do so? Would it improve the purity of our morals to doom certain innocent parties to a life of celibacy; or would it render marriage more honourable, to enable those persons to retain the name of marriage without the reality, who have dishonoured it by profligacy?

"As already noticed, no pretext for this exists in the plea of *comitas*, because the English courts do not adopt the Scotch remedies for adultery towards persons whose marriages were solemnized in Scotland. In the next place, the Commissaries have no power to introduce the general system of the law of England. Are they to compel parties to find caution to live chastely? If they enter into new marriages, will they be protected against prosecutions for bigamy, or notour adultery, by the English statute of James the First?

"In one word, the Commissaries admit that they have jurisdiction in this case. Their powers in this, as in other cases, form the measure of their duties. They are evidently persisting in erroneous notions, in opposition to the opinion of the Supreme Court."

Now, what the Commissaries had really proposed by their judgment, was to give the inferior remedy of the Scotch law, in the Scotch form, if required, in the case of English parties whose relation of husband and wife, as it subsisted in their own country, it had been ascertained by the best evidence, that the Scotch Court could not *effectually* dissolve. The reasons of that conclusion were fully stated, and do not appear to have been ever hitherto considered by any party. In particular, it has not been shown that these reasons are in any respect affected by the circumstance, that the Consistorial Courts of England have not power to grant divorce *a vinculo* of a lawful marriage in any case, whether of foreign or domestic parties.

The style of the passages quoted can only call for notice in regard to the consistorial jurisdiction and law. It accords perfectly with the object and tendency of the whole other pleadings and arguments, maintained without any real contradictor in all of these English and Irish cases. But from the tenor of the judgments and interlocutors upon record, it will be easy to form an opinion how far the charge of contumacy, thus plainly insinuated against the Judges of the Primary Tribunal, for the purpose of overturning their decisions in the Court of Review, has any real foundation whatever, and whether the statement of this most unjust and groundless imputation can be accounted for otherwise than by reference to the well known tactics of forensic warfare.

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Note (L.) p. 389.

THE opinions delivered by the Judges of the Second Division of the Court of Session at the advising of this case, and that of Kibblewhite against Rowland, as reported together by Lord Cringletie, Ordinary, were given in the following terms:

*Lord Cringletie* presented the bills of advocacy without any remark.

“*Lord Justice-Clerk*.—I have no difficulty in saying, that I entirely differ from the Commissaries as to the interlocutor which they have here pronounced; and I am decidedly of opinion, that it ought to be altered, and that a special remit should be made to them to proceed with this divorce according to the rules of the law of Scotland.

“Having given my opinion upon the general argument at a former period, I feel it now only necessary to state, as formerly, that it coincides with the unanimous opinion of the ten Judges, on the question proposed to them by this Court.

“With regard to the particular circumstances of this case, it appears from the proof which has been led as to the residence of the defender, Mr. Levett, that he has lived for a considerable time within the bounds of the territory of Scotland. It is established, that he has resided at different places, but all of them within Scotland, for a year and a half, or nearly two years. Although he has no house in property or under lease, he has lived in lodgings; in one of which the notice or citation in this action was personally served upon him. These facts are established by the proof.

“With regard to the existence of collusion, which is one of the qualifications in the opinion given by the consulted Judges, you have an oath of calumny by the pursuer, which, in all the circumstances that could tend to establish collusion, completely negatives every idea of its existence in this case. It is thereby ascertained, that there has been no understanding, direct or otherwise, between the parties, in regard to the

institution of this action. There was no collusion in the husband's coming to Scotland. There was no communication whatever relative to his coming to Scotland and residing there between him and any person acting for the pursuer, and taking an interest in the proceedings upon her part; and she does not believe that there has been "any communication whatever upon the subject, either between her any friend or agent upon her part, or between any friend or agent of his with any friend or agent of hers."

"In these circumstances, then,—when there is no suspicion of collusion—where a complete domicile has been established, sufficient under every view of the law of Scotland to found jurisdiction, and that independently of the personal citation given to the defender,—where the wrong or act of adultery was committed in Scotland,—the question is, Whether there is any thing in the principles of our law to prevent a divorce being granted in this case? The Commissaries of Edinburgh have thought proper to find, that, although they have a perfect jurisdiction in regard to this case, yet, because divorce is only granted as an extraordinary remedy in England, where the parties were married and formerly resided, they have no authority by the law of Scotland to grant a divorce *a vinculo matrimonii* to the pursuer of this action. I think, however, that the principles of our law call for a decision very different from that of the Commissaries; and I am for remitting to them, with instructions to proceed according to our own law in the decision of this case. I cannot go into the distinction of acknowledging a jurisdiction that authorizes the Commissaries to entertain a case in the Consistorial Court, and to award on account of adultery, that limited species of redress, namely, a divorce *a mensa et thoro*, which, although allowed in the Ecclesiastical Court in England, has hitherto been unknown to us, and which, at the same time, authorizes them to refuse the only remedy which the law of Scotland prescribes. The English law cannot be the rule which ought to be followed by our Courts in such a case.

"*Lord Bannatyne.*—When our opinions were given formerly, upon the general question, I held a different one from that which was adopted by the majority of the Court. But I am for altering the opinion of the Commissaries in this particular case. There is no inconsistency between my judgment in regard to this case, and the opinion which I delivered on a former occasion. The question at present is not what is right in the general question, but what is so in the case before us. This case went to the Commissaries from this Court on a remit, with instructions; and the question is, what was the meaning of that remit in this particular case? When your Lordships determined the case formerly, the Court proceeded upon two views. The majority of the Court thought, that wherever there is residence in Scotland sufficient to found jurisdiction in its Courts, there it is proper to apply the law of Scotland, and that the Commissaries were not at liberty to pay any regard to the law of the country where the marriage took place. On that point I differed from the majority of the Court; I was disposed to think, that there is a distinction between that residence which merely founds jurisdiction, to which effect our law requires only the short residence of forty days, and that which entitles a Court in this country to apply their own law in a question of divorce between parties who had been married in England, or any other country having a system of municipal law different from ours, and thought that preference should be given to the law of the country in which the marriage was contracted, between parties, who

as natives, or having a fixed domicil in it, were at the time subject to the general authority of its laws, to which I did not conceive that we had a right to deny effect, as the measure of the rights belonging to them as married persons, to the extent of applying the particular rules of our own law, except in the case of their withdrawing themselves from the authority of the one, and becoming subject to the other, by a fixed and permanent residence in Scotland. Under this view, therefore, I hold our Courts in this case bound to apply the law of England, conceiving the pursuer still to retain the same fixed domicil in England which he had before the marriage took place. Your Lordships, however, were of opinion, that there is no such distinction recognised by the law of Scotland, and that residence sufficient to found jurisdiction is sufficient to warrant the law of this country being applied in a question of divorce; and that being your opinion, and thereby expressed as the judgment of the Court, I think, with great deference to the Commissaries, that they were not at liberty to apply their own opinion against that of this Court.

“*Lord Glenlee.*—My opinion went the same way with that of Lord Bannatyne, on the former occasion he spoke of, and if I were satisfied that, from an explicit order, or by clear implication from the terms of our remit, the Commissaries ought to have understood the opinion of this Court to be, that where there is residence sufficient to found jurisdiction, the law of Scotland should be applied, I should agree with his Lordship likewise in thinking that the Commissaries have done wrong; and I should think that, instead of proceeding to consider the question before us, we should at once alter their interlocutor, as inconsistent with the remit of the Court. But I do not think that such were the terms of the remit. It allows “the pursuer to prove that the defender was domiciled and resident in Scotland, when the action was raised; and instructs the Commissaries to make what inquiry they may think proper and competent, in order to ascertain whether the process be collusive, *and thereafter to proceed according to law.*” I think the Commissaries have acted in strict conformity to this judgment; and however the facts might stand with regard to the matters which they were to inquire into, they were entitled to pronounce any judgment that appeared to them to be according to law. If they happened to be in this Court, they might hear what the different Judges said, but we are not to suppose that they were in Court, or heard the reasons of the Judges for their opinions; and they were bound therefore to go by their own judgments, and to attend only to the terms of the remit.

“I may mention here with propriety, that I adhere to my former opinion; but I think it unnecessary to repeat the grounds upon which it is formed. I shall just say, in the first place, that I would pay great attention to the true meaning of the whole Lords in the opinion they gave on the question proposed to them by this Court. But, upon the fullest consideration I can give the matter, it seems to me explicitly stated, that they meant to decide nothing whatever, but that the mere fact of a marriage having been celebrated in England, is not *per se* a sufficient ground for refusing a divorce in Scotland. In that opinion I concur with them; and that is the whole length of the opinion of the Judges. I think certainly that a marriage having been celebrated in England, is not a sufficient ground *per se* for refusing divorce in Scotland.

“On the other hand, I think that the question with respect to domicile is of great importance; and if I were satisfied that it is proved here, that such a domicile has been established as, to all intents and purposes, subjects the parties to the law of Scotland, I should think the Commissaries wrong in their interlocutor. But I am satisfied, that, although such a domicile as that which has been proved, and personal citation, of itself enough, are sufficient to give the Commissaries a jurisdiction, it is quite a different consideration, according to what law the question should be decided. In the same manner, such a domicile may be established, as may give jurisdiction; for example, in a question of succession; but it is quite a different question by what law the succession shall be determined. It does not follow, that, because jurisdiction is established in our Courts, the succession shall be regulated by the law of Scotland. It appears to me as plain as light of day, that residence, established of the kind stated in both of these cases, should be no reason for giving the parties the benefit of the law of Scotland, with regard to divorce. They are not in such a situation as to authorize this. The lady seems just to have come here to be enabled to take another husband, contrary to the law of her own country, for she seems to have no view of settling here, in order to enjoy such benefit in Scotland. I am, therefore, for adhering to the interlocutor of the Commissaries

“*Lord Robertson.*—When this case was first before your Lordships, I stated, at length, the grounds of the opinion which I delivered, and which led me to concur in the remit to the Commissaries to alter their interlocutor, and to proceed in the divorce, agreeably to the law of Scotland. At that time a difficulty occurred, whether there was any evidence as to the domicile of the defender, so as to found jurisdiction against him, and the remit was made for ascertaining the fact as to the residence of the defender in Scotland; and, *secondly*, whether there was collusion. I think the Commissaries were entitled to proceed as they have done in the case, and have acted in strict obedience to this remit. It was confined to these two points, viz. to inquire regarding the domicile of the defender in Scotland,—whether it was such as to found jurisdiction; and to inquire whether there was collusion between the parties. They have led proof upon these points, and they have then proceeded as they saw cause. In their situation, I would have pronounced a different judgment; but I do not blame them for proceeding according to their own opinions in the decision now under review.

“With regard to the proof which has been led, the evidence as to residence is all that can be brought, or can be expected. The great difficulty as to a proof of residence is, as it is connected with the question of collusion. If it appeared that a party had come to Scotland merely to found a jurisdiction, in order that a divorce might be sued for and obtained, I would have great doubts of sustaining a residence in this country, as a sufficient ground for granting a divorce. But I see nothing in this proof that can induce such an opinion respecting the parties in the present case. I do not find any thing in the whole of the evidence that can lead to the conclusion, that the residence here was in order to found a jurisdiction, that divorce might be obtained.

“With regard to the question of collusion, the proof is entirely satisfactory. Mrs. Levett answers every question fully and fairly; and there appears to have been no collusion, directly nor indirectly, on her part with her husband, nor by any other person for her behalf. I therefore

concur in opinion with your Lordships, and I am for altering the interlocutor of the Commissaries.

“*Lord Craigie.*—I was not here when your Lordships formerly pronounced a decision on this question. At the same time, I agree in opinion with your Lordships on the point of jurisdiction; and I think, that where there is jurisdiction, the law of Scotland must have effect.

“It appears to me, that, according to the strict words of your interlocutor, the Commissaries were at liberty to pronounce such a judgment as they might think right. But from their access to this Court, I should think they might know the sentiments of the Judges when such a case as this is decided here; and I own that I would not, in their circumstances, have pronounced the interlocutor which they have done.

“On the question of collusion we are all agreed. There appears to have been no collusion between the parties.

“With regard to the domicile—taking into view the circumstances of this case,—the fact of the adultery having been committed in Scotland,—the defender’s domicile being established here (and I think residence within the territory of Scotland for forty days is sufficient to found jurisdiction,) the law of Scotland must be applied. In consequence of their passing from England here, the defenders have no domicile but in Scotland. No action, it would appear, can be instituted in England against them till they return thither. I am, therefore, for altering the interlocutor of the Commissaries, and for remitting to them with instructions to proceed in the divorce.”

The *Lord Justice Clerk* expressed his conviction in strong terms, that the general question must now be held as decided, and could not again, with propriety, be brought under the review of the Superior Court.

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Note (M.) p. 394.

THE collection entitled, “*Sacrosancta Concilia ad Regiam Editionem exacta Philip. Labbei et Gab. Cossartii,*” has been selected as satisfactory authority with regard to the practice of the Roman Catholic Church on the subject of divorce.

The tenth Canon of the council of Arles, held *anno* 314, is the first on the subject which has been there observed, and it is in these terms: Tom. i. p. 1427. “*De his qui conjuges suas in adulterio deprehendunt, et iidem sunt adolescentes fideles, et prohibentur nubere, placuit ut in quantum possit consilium eis detur, ne viventibus uxoribus suis, licet adulteris, alias accipiant.*”

These expressions seem to imply that the previous rule and general practice were in favour of divorce *a vinculo* for adultery, and only to dissuade a particular class from the exercise of that right.

The eighth Canon of Council of Neocæsarea, held *anno* 314, *ibid.* page 1485, is the next. It relates only to the clergy, and is thus expressed: “*Mulier cujusdam adulterata laici constituti, si evidentur arguatur, talis ad ministerium cleri venire non poterit. Si vero post ordinationem adulterata fuerit dimittere eam convenit. Quod si cum illa convixerit ministerium sibi commissum obtinere non poterit.*”

In the Canons of the Council of Gangres, held about the year 325;

it has been stated by Hermant in his *Histoire des Conciles* that the decision was against divorce. The Canon is in these terms: Labb. Tom. II. page 422. "Si qua mulier virum proprium relinquens, decedere voluerit nuptias execrans anathema sit." Here no allusion is made to divorce *a vinculo*, or to *judicial* separation for adultery, or any other cause.

The Council held at Mileve, *anno* 402, *ibid.* Tom. II. page 1117, did resolve to apply to the Emperor for a law, prohibiting divorce *a vinculo*, according to the terms of the following Canon: No. 102. "Placuit ut secundum evangelicam et apostolicam disciplinam, neque dimissus ab uxore, neque dimissa a marito alteri conjugatur, sed ita maneat, aut sibimet reconcilientur: quod si contemserint ad pœnitentiam redigantur. In qua causa legem imperialem petendum est promulgari." And the same resolution is repeated, *ibid.* page 1541, as confirmed by the general Council of Africa, *anno* 415. But it does not appear that any such law was then obtained. If passed, too, it would have been an ordinary legislative measure, subject to be repealed or altered by the power from which it proceeded.

Upon the other hand, the chapter entitled "Synodus S. Patricii, Auxilii, et Issernini Episcoporum, in Hibernia celebrata," *anno* Christi 450, *ibid.* Tom. III. page 1484, contains this Canon: "Audi Dominum dicentem: 'Qui adhæret meretrici unum corpus efficitur. Item, adultera lapidetur, id est, hinc vitio moriatur ut desinat crescere quæ non desinit mæchari. Item, si adultera fuerit mulier numquid revertitur ad virum suum priorem: Item, non licet viro dimittere uxorem nisi ob causam fornicationis,' ac si dicat, 'ob hanc causam.' Unde si ducat alteram velut post mortem prioris non vetant."

The sixth Canon of the Council held at Angiers, *anno* 453, *ibid.* Tom. IV. page 1021, again contains this general but not explicit interdiction: "Hi quoque qui alienis uxoribus, superstitibus ipsorum maritis nomine conjugii abutuntur, a communione habeantur extranei."

But the second Canon of the Council held at Vannes, *anno* 465, *ibid.* Tom. IV. page 1055, excepts the case of divorce for adultery as lawful thus: "Eos quoque qui relictis uxoribus suis sicut in evangelico dicitur **EXCEPTA CAUSA FORNICATIONIS**, sine adulterii probatione alias duxerint, statuimus a communione similiter arcendos; ne per indulgentiam nostram prætermissa peccata, alios ad licentiam erroris invitent."

The Council held at Aige, *anno* 506, *ibid.* Tom. IV. page 1387, by the twenty-fifth Canon, authorizes divorce after a judgment of the bishop of the diocese.

Another Council, held at Toledo, *anno* 693, deposed the bishop who had opposed the divorce of King Egica, Tom. V. page 1349.

The ninth Canon of the Council held at Soissons, *anno* 744, declares divorce *a vinculo* to be permitted to husbands "**causa fornicationis**," *ibid.* Tom. VI. page 1553.

The second and eighteenth Canons of the Council of Verberies, *anno* 752, permit wives in certain cases to marry again whose husbands had committed adultery, *ibid.* Tom. VI. page 1657.

The Council of Compiègne, held *anno* 757, *ibid.* Tom. VI. page 1697, contains many Canons favourable to divorce *a vinculo*, and, among others, 16. "Si vir leprosus mulierem habeat sanam, si vult ei donare commeatum ut accipiat virum, ipsa femina si vult accipiat. Similiter et vir."

The 36th and 37th Canons of the Council of Rome, *anno* 826, permit divorce *a vinculo* for adultery, *ibid.* Tom. VIII. page 112.

Pope Nicolas the Great, in his Responses, “ad consulta Bulgarorum,” approves of divorce, on account of adultery, article 96, *anno* 859, *ibid.* page 546, Tom. VIII.

By the Canons of the Council of Tibur, *anno* 895, from the 41st to the 46th, divorce *a vinculo* seems to have been permitted in various cases for adultery, *ibid.* Tom. IX. page 462.

The 16th Canon of the Council of Bourges, held *anno* 1031, *ibid.* Tom. IX. page 1031, is in these terms: “Ut qui uxorem SINE CULPA FORNICATIONIS dimiserit, alteram illa vivente non ducat.

“Ut illi qui uxores legitimas SINE CULPA FORNICATIONIS dimittunt, alias non accipiant illis viventibus, nec uxores viros, sed sibimet reconcilientur.”

The 12th Canon of the Council of Rheims, *anno* 1049, *ibid.* page 1042, prohibits the husband to marry another, “legitima uxore *dere-  
licta.*”

The 16th Canon of the Council of Rouen, *anno* 1072, *ibid.* Tom. IX. page 1228, prohibits the husband, whose wife had taken the veil, to marry another.

Pope Alexander III. answered to the consultation of the French prelates, “Licet Romana ecclesia non consuevit, propter maleficia legitime conjunctos dividere, si tamen consuetudo generalis Gallicanæ ecclesiæ habet ut ejusmodi matrimonium dissolvatur nos patienter tolerabimus.”

The Council of Dalmatia, by the tenth Canon, *anno* 1199, *ibid.* Tom. XI. page 10, excommunicates those, “qui proprias dimiserunt uxores vel de cætero dimiserint SINE JUDICIO ECCLESIAE.”

The Council of Florence, *anno* 1439, *ibid.* Tom. XIII. decided, that the subsistence of the law of divorce in the Greek Church, and the difference in other points of discipline between it and the Latin Church, should be no obstacle to their reunion.

In this fluctuating and uncertain state, the law of the Roman Catholic Church, as to divorce, seems to have remained at the time when the Reformation was established, both in England and in Scotland; and it was some years after the dates of these events that the Canons of the Council of Trent *De sacramento matrimonii* were promulgated, upon the 11th of November 1563; the seventh of which does dogmatically settle the question for the adherents of the Church of Rome in these terms: “Si quis dixerit, ecclesiam errare, cum docuit et docet, juxta evangelicam et apostolicam doctrinam, propter adulterium alterius conjugum matrimonii vinculum non posse dissolvi, et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse altero conjugate vivente, aliud matrimonium contrahere, mæcharique eum qui dimissa adultera aliam duxerit, et eam quæ dimisso adultero alii nupserit, ANATHEMA SIT.”

But without assuming that any positive law was meant to be promulgated upon the subject of divorce by the Divine Author of our religion, for all nations, times, and circumstance, or entering upon the point at all as a question of casuistry, a judgment may easily be formed by those who retain the freedom of thought, as to the spirit and temper in which these decisions of that celebrated Council were given, from the three concluding Canons of this chapter. These are, “10. Si quis dixerit,

**statum conjugalem anteponendum esse statui virginitatis vel cælibatus, et non esse melius ac beatius manere in virginitate aut cælibatu quam jungi matrimonio ANATHEMA SIT.**

“11. Si quis dixerit, prohibitionem solemnitatis nuptiarum certis anni temporibus superstitionem esse tyrannicam, ab ethnicorum superstitione profectam, aut benedictiones et alias ceremonias quibus ecclesia in illiis utitur, damnaverit, ANATHEMA SIT.

“12. Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos, ANATHEMA SIT.”

The unqualified anathemas of the Church of Rome are here denounced against all who may allege that it is not better to remain either in virginity or *celibacy* than to marry;—or who may affirm that it is superstitious to forbid marriage during certain seasons of the year;—or deny that the right of jurisdiction in matrimonial causes belongs to the Ecclesiastical Courts;—as well as against whoever shall maintain that divorce *a vinculo* may be permitted for adultery, according to the exception in the words of the answer of our Saviour, recorded by St. Matthew, upon the questions put to him as to the lawfulness of dissolving marriage by divorce. Some idea, in particular, of the principles and practice of the Ecclesiastical Courts of the Church of Rome in Scotland, as to matrimonial causes, may be formed from the extracts given in a subsequent note, as copied from their own records.

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Note (N.) p. 386.

In illustration of the proposition here stated in the text, it may be sufficient to quote the following Translation of a part of that section of the Prussian Code published at Berlin, in 1795, “concerning Divorce by sentence of a Court,” Vol. III. p. 84, beginning at section 668.

“668. A legal marriage can be dissolved by the sentence of a Judge.

669. Such divorces, however, cannot take place without the most forcible reasons.

670. Adultery (*Ehelruch*) committed by one party, justifies the other to sue for divorce.

671. But should the wife be guilty of adultery, she cannot, under the pretence that her husband has also been guilty of it, prevent divorce.

672. Sodomy, or such other unnatural crimes, are deemed equivalent to adultery.

673. The same consequence follows from an illicit intimacy, from which a strong presumption may arise of the marriage vow being broken.

674. Mere suspicion is not a sufficient ground for divorce.

675. But if probable cause exists for such a suspicion, then must the accused party, at the summons of the other, be judicially interdicted all intercourse with the suspected person.

676. If, after such interdict has been obtained, an intimacy betwixt the interdicted parties still continues, this will constitute a sufficient reason for a divorce.

677. A divorce may also be obtained on account of wilful desertion.

678. But the mere change of the usual place of residence is not to be considered as a desertion.

679. On the contrary, if the man changes his residence, the woman is bound to follow him.

680. But if she contumaciously refuses to do so, after the order of a

Judge to that purpose, then her husband is well entitled to sue for a divorce.

681. But the wife is not obliged to follow the husband, should he, by commission of a crime or other infringement of the laws, be obliged to leave the King's dominions.

682. In the same manner, she is dispensed from following her husband, should that be specially provided by her contract of marriage.

683. In every event, the man is bound by law to receive his wife, should she chuse to follow him.

684. But should he obstinately refuse this without sufficient cause (see § 687), he furnishes the wife with a good ground of divorce.

685. Should the wife leave her husband without his consent or just reason, then the Judge must exhort her to return.

686. Should the judicial summons of adherence be without avail, the husband can then insist for divorce.

687. In no event is the husband bound to receive back his wife, who has left him without just cause, of her own accord, until, by creditable witnesses, she shall prove that, during her absence, her conduct has been irreproachable.

688. Should the residence of the absent party be unknown, or so far removed from the Prussian territory that no judicial order for reuniting the parties as a married pair can be given, then the party willing to adhere is entitled openly to summon, and if this should fail, to sue for divorce.

689. But such circumstances of desertion must be proved as tend to ground a strong presumption of the intention to desert the other party.

690. But it is not possible to resort to the public summons till a year after the departure of the absent spouse.

691. During this year the party remaining at home must use every possible endeavour to discover the retreat of the absent party.

692. If it appears from circumstances, that the absent spouse had deserted for good and lawful reasons, then the other party must wait ten years after the desertion; and can even then only pursue for a declarator of death.

693. If the real causes of desertion appear to be doubtful, then the suit for divorce, after the expiry of two years (§ 690) from the appointed time, and under the prescribed limits, takes place.

694. Obstinate and continued refusal of the marriage rights shall be considered in the same light as wilful desertion.

695. A spouse who, by his conduct during or after cohabitation, prevents the proper object of marriage from being accomplished, entitles the other party to sue for a divorce.

696. An utter and incurable incapacity to perform the marriage duty, even although it should arise during the subsistence of the marriage, is sufficient to ground a divorce.

697. The same takes place in consequence of other incurable bodily frailties, that excite disgust and horror, or entirely prevent the fulfilment of the object of marriage.

698. Madness and idiotism affecting either of the spouses, can only give occasion for divorce, if they continue longer than a year, and then afford no reasonable hope of recovery.

699. If one of the spouses attempts the life of the other, or uses such

violence as to endanger his life or health, then the injured party is entitled to sue for divorce.

700. The same consequence follows coarse and unlawful attacks on the honour or personal liberty of the other spouse.

701. For mere verbal offences or threats, and also for trifling acts of violence, married people in the lower ranks shall not be divorced.

702. Among the middle and higher ranks also, divorce can only be granted if the offending spouse is obstinately and repeatedly guilty of verbal or personal injury, without the strongest provocation.

703. Incompatibility of temper and quarrelsome disposition are causes of divorce, if they rise to such a height as to endanger the life or the health of the innocent party.

704. Opprobrious crimes, for which one spouse has received sentence of imprisonment, or commitment to the house of correction, justify the innocent party to apply for divorce.

705. The same happens, if one spouse falsely accuses the other of such crimes, knowing the accusation to be false.

706. Further, if a spouse, by intentional unlawful transactions, endangers the life, honour, office, or trade of the other party.

707. If a spouse commences an ignominious employment, the other can sue for divorce.

708. For drunkenness, extravagance, or imprudent management of a spouse, marriage shall not be immediately dissolved.

709. But the Judge shall, at the instance of the other party, take such measures as shall tend to reform the guilty party, and prevent the bad consequences of such a course of life.

710. Should the guilty person make no reformation after these judicial admonitions, but persist obstinately in the former course, the marriage may then be dissolved at the further application of the injured party.

711. A wife is entitled to sue for a divorce on account of being inadequately maintained, only in case the husband's fortune shall have been impaired by his own crimes, mismanagement, or extravagance.

712. But if the man refuses the woman her maintenance, the Judge must fix her provision according to the husband's fortune, and compel payment.

713. But should the man, in spite of this, obstinately refuse the woman her maintenance, she may then sue for divorce.

714. In general, in every case the Judge must, in his judicial capacity, do all in his power to restore a good understanding between the married pair, and to remove the causes of their dissatisfaction.

715. In so far as a difference of religious faith is from the beginning, an obstacle to marriage, in like manner will a change of religion by one of the spouses during the marriage give legal ground to the other to sue for a divorce.

716. Marriages, where there are no children, can be dissolved by mutual consent, if there is no reason to suspect levity, precipitation, or compulsion on either side.

717. But, with the exception of this case, a marriage cannot be dissolved for alleged dislike, if this cannot be supported by just cause.

718. Nevertheless the Judge shall be permitted, in particular cases, to dissolve the marriage, where it appears to him, that the dislike is so

strong and deeply rooted that all hopes of a reconciliation, or attaining the object of marriage, are at an end.

719. In this instance, however, the spouse insisting for divorce against the will of the other, without any proper legal grounds, must be declared the guilty party, and found liable for the penalties of divorce.

720. If the spouse insisting upon divorce induces, by immoral conduct, the party willing to continue the marriage to commit those offences on which the claim for divorce is founded, the divorce cannot be granted.

721. Offences which have once been expressly forgiven can never afterwards be resorted to as grounds of divorce.

722. Forgiveness is presumed, if the offended party, after receiving convincing proof of the guilt, continues the marriage for a year.

723. The mere performance of the matrimonial duty, to which they were both bound before the commencement of the suit, does not infer a forfeiture of the right to sue for divorce.

724. During the process of divorce, one of the spouses cannot separate from the other without his consent.

725. But when the divorce is pursued for causes threatening the life, or endangering the health of the pursuer, and these causes seem to be well founded, then the Judge can grant a separation pending the divorce.

726. Only in this case can the wife demand, that the husband shall maintain her out of the house.

727. The expense of process must be defrayed by the husband at the instance of the wife, from her fortune, or, if she has none, from his own.

728. If the divorce is only sued for on account of the less important reasons detailed in sections 675, 676, 702, 708, 709, 710, 711, and it shall appear from the interference of the Judge, that there are hopes of a future reconciliation, the Judge may delay the publication of the sentence of divorce; but not beyond a year.

729. During this time, it is permissible for the spouses to live separate.

730. How matters are to be arranged in the meantime, with regard to the education of the children, their support, and that of the wife, and the security of the property, the Judge must regulate according to a sound discretion, without the necessity of a new process for that purpose.

731. After the expiration of the appointed time, the Judge must again attempt to reconcile the parties; and if this be without avail, the sentence must be pronounced without farther delay.

732. The dissolution of the marriage state takes place from the instant that the decree of divorce has received the sanction of the law.

733. And this sentence produces an entire dissolution of the marriage, and its consequences, in relation to both spouses.

734. Sentence of mere separation from bed and board shall not be pronounced, if even only one of the spouses be of the Protestant religion.

735. If the Judge pronounces a perpetual sentence of separation from bed and board, this has all the civil effects of a regular divorce between Roman Catholics.

736. It is left entirely to the conscience and religious principles of a divorced spouse to make use of the dissolution of the former marriage to contract a new one.

737. But if circumstances occur during the divorce, making a second

marriage with a specified person improper, then such married person can only be permitted to remarry at all by virtue of a special licence.

738. But this permission must be granted, of course, by the Judge who has pronounced the divorce, when it does not appear from the proceedings in the process of divorce, that the person whom the divorced party wishes to marry is the same person to whom the interdict applies.

739. The divorced wife retains, in general, that rank which her husband enjoyed at the time of the divorce."

These extracts are made from the new Prussian Code, entitled, *Allgemeinis Landvicht für die Preussischen Staaten* (General Code of Common Law for the Prussian States,) 3d edit. Berlin, 1796. This Code was prepared in the reign of Frederick William II.; and in a letter patent from that Sovereign, under the Great Seal, which is prefixed to it, this new Code is declared to supersede a former collection, published in 1791, as well as all laws, edicts, and ordinances promulgated anterior to the present publication, with the exception of some peculiar provincial usages. The letter-patent bears date the 5th of February 1794; and the new Code was to acquire the force of law from the 1st of June of that year.

The Danish laws, according to the Code of Christian V. contain the following rules upon divorce: "1. Si conjux cum conjugis fratre, sorore, vel persona sanguine ipsi proxime conjuncta, contra legem Divinam corpus misceat, et singularem ob causam, remissionem poenæ capitalis impetret; conjugibus indivulso matrimonii vinculo permanere conceditor, nisi innocens nocentem connubio suo exigi desideret.

"4. Si maritum vel maritam lepra, quam ante nuptias non detexit, laborasse, posteaq. contagionem a morbida ad sanam personam serpsisse probabile sit: parti læsæ divortii cum lædente faciendi potestas esto.

"6. Si maritus aut marita furtum aut aliud infame facinus designasse deprehenditur, capitali quidem supplicio dignum, sed cui poenæ capitalis remissio singulari magistratus indulgentia conceditur: non ideo conjugii vinculum dissolvitur. Quod si talis persona malifica exilio fuerit multata, aut profugerit: restitutione in integrum a magistratu intra triennium non impetrata; liberum esto parti innocenti ad novum transire conjugium, dummodo se interea honestam atq. impollutam egisse vitam legitime queat ostendere.

"7. Si quis exilio multatus sit; nec tamen ob facinus infamia dignum; septennium uxor maritum expectato; si interea magistratum sibi propitium reddere, ac restitutionem in integrum queat impetrare: sin minus; elapso septennio, novum uxori conjugium permittitor."

But no Code of any Protestant State has gone further in exercising, at discretion, the power to legislate upon this subject, than had been usual in the States of Christendom before the Reformation. In the very kingdom established in the Holy Land by their united efforts, in the Crusades, at the instigation and under the direction of the Church of Rome, this extract from the "*Assisiæ Regni Hierosolymitani*," proves how the rule stood as to divorce.

"Per che si può divider il matrimonio dappoi fatto.

"CLV. Se un' homo prende moglie, la qual poi diventa lazarina, ò caze del mal de la brutta troppo bruttamente, ò gli spuzza troppo la bocca, ò che la pissa ogni notte in letto, sì che tutti li drappi si guastino, la rason commanda che sel marito si rechiamo à la Chiesa, et non vole esser con lei, per il mal che, la Chiesa debba spartirli de jure, ma

auanti che gli divida, la Chiesa diè metter la femina in una casa con tre altre honeste femine, quale stiano per quindese giorni insieme, over per un mese, per veder se è il vero, quel ch'el suo marito dice, et se così è vero, deve spartirli, ita che colui per cui l'habe si harà spartito, entri in religione, et il marito dapoì puol torre altra moglie; et questo istesso sia del marito, se lui havesse alcuno de tal mali, et la moglie fusse netta, et così si deve judicar, come è ditto di sopra, de jure et consuetudine."

*Sel. Const. Medii ævi, Tom. II. p. 515. Barb. Leg. Ant. Paul. Canciani, Venet. edit. anno 1783.*

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Note (O.) p. 398.

AT the time this opinion was given, the MSS. volume of the decrees of the Official at St. Andrews, in the archdeaconry of Lothian, and the MSS. Liber Sententiarum of the principal auditory of that province, had not been sent to the Register Office. In neither of these collections has a single case of divorce *a vinculo* for adultery been found. But the former contains a very great number of sentences of separation *a mensa et thoro*, on the ground of adultery.

For example, in the case of John Bayne against Margaret Anderson, 30th March 1524, fol. 130, the sentence is for separation and divorce "a mensa, thoro, mutua cohabitatione, et servitute," for adultery. The same sentence, on the same ground, there appears to have been pronounced in the case of Margaret Blackadder against William Ramsay, her husband, on the 20th August 1524, fol. 134, *verso*, and in a great variety of other cases, which it would be endless to cite.

The Liber Sententiarum of the principal auditory and Court of Appeal at St. Andrews contains, *inter alia*, the case of Elizabeth Rattray against Thomas Keir, 23d August 1542, in which a similar sentence of separation by divorce, for adultery, was confirmed upon appeal. Also the case of Janet Beatoun et Simon Prestoun, not dated, fol. 57. Also the case of John Horner against Marriot Crail, 15th August 1544, fol. 84, *verso*, where similar sentences, by the Official of Lothian, were affirmed.

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Note (P.) p. 398.

THE register of the decrees of the Official of St. Andrews for the Archdeaconry of Lothian, from the year 1500 to 9th June 1541, already mentioned in the preceding Note (H.), contains so great a number of divorces, on the ground of carnal connection before marriage by one of the spouses with a relation of the other, which, even in the fourth degree either of consanguinity or affinity, was held in the canon law to be incest, that it seems not improbable that more marriages may have been annulled in this manner during the last fifty years before the Reformation, in the province of St. Andrews alone, than were dissolved by divorce *a vinculo* in an equal period of time by the present Consistorial Court after its first institution. Without distinction of rank or consideration how long the marriage might have subsisted, and whether there had been issue of that marriage or not; upon the mere confession of such constructive incest, for the purpose of regaining freedom, and

by thus defaming a third party to the church, a divorce seems always to have been obtained without difficulty. Thus, for example, in the case of Mr. Lauder, a gentleman at the head of a family of note, against his wife, the procedure is recorded as follows:

**“Sententia Divortii LAUDER et LOGANE.**

“CHRISTI nomine invocato nos Thomas Cowtis, vicarius de Cargill, ac officialis Sanctiandreensis infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa matrimoniali tendente ad divortium coram nobis mota, et adhuc pendente indecisa, inter honorabilem virum Robertum Lawder, *de eodem*, actorem ab una, et Jonetam Logan suam pretensam sponsam ream partibus ab altera, cognoscentes juxta ea que vidimus, audivimus, et cognovimus, jurisperitorum communicato consilio, et secreto quibus fidelem fieri fecimus relationem, in eadem solum Deum pre oculis habentes ejusque nomine sanctissimo, primitis invocato, per hanc nostram sententiam diffinitivam quam fecimus, in his scriptis, pronunciamus, decernimus, et declaramus pretensum matrimonium, inter dictos Robertum et Jonetam de facto et non de jure contractum, et in facie ecclesie solemnizatum, carnali copula subsecuta, ab initio fuisse nullum et invalidum, nec viribus subsistere poterit causante impedimento subscripto. Ex et pro eo quia ipse Roberto Lauder ante contractum matrimonium, inter ipsum et prefatum Jonetam Logane, carnaliter cognovit quandam Cristinam Hepburne attingentem dicte Jonete Logane in quarto, et quarto gradibus consanguinitatis: et sic dictus Robertus et Joneta attingunt invicem, in eisdem gradibus affinitatis. Propterea dictum Robertum et Jonetam, ab invicem seperandos et divortiandos fore prout separamus et divortiamus; et quicquid alter alteri dederit dotis aut donationis, causa propter nuptias iterum restituendum fore decernimus ac licentiam alibi nubendi dicto Roberto in domino ubi placuerit impertimus; et hoc omnibus et singulis quorum interest notum facimus per presentes.”

Similar judgments had been before given by the same tribunal, *inter alia*, in the case of David Edmonstone against Elizabeth Kerr, his wife, on account of carnal connection with Lord Home, her kinsman, in the fourth degree of consanguinity, before her marriage to Mr. Edmonstone, upon the 24th December 1523. In the case of William Schaw against Janet Wilson, his wife, on account of the pursuer's confessing carnal connection before their marriage with Janet Weir, the defender's relation in the fourth degree of consanguinity, upon the 30th January 1524; and in the case of Adam Nisbet against Janet Wolfe, his wife, on the same ground, upon the 30th March 1524.

The case of Wilson against Schaw may be taken as another example. It stands in the record thus:

**“Sententia Divortii WILSONE et SCHAW, 30 Martii, anno 24, (i. e. 1524.)**

“CHRISTI nomine invocato nos Thomas Cowtis, Vicarius de Kergill, ac officialis Sanctiandreensis infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa divortii, coram nobis mota et adhuc pendente indecisa inter Willielmum Schaw actorem ubi una, et Jonetam Wilsone, suam pretensam sponsam maritatem ream, partibus ab altera, cognoscentes juxta, ea que vidimus, audivimus, et cognovimus, jurisperitorum communicato, consilio et secuto, quibus fidelem fieri fecimus relationem, in eadem solum Deum pre oculis habentes, ejusque nomine sanctissimo primitus invocato, per hanc nostram sententiam diffinitivam,

quam fecimus in his scriptis, pronuntiamus, decernimus, et declaramus matrimonium de facto, et non de jure, inter dictum Willielmum et prefatam Jonetam contractum et in facie ecclesie solemnizatum carnali copula subsecuta, fuisse et esse ab initio nullum et invalidum, et contra constitutiones sacrorum canonum celebratum, causante impedimento subscripto. Ex et pro eo quia dictus Willielmus Schaw, longe ante contractum, et solemnizationem pretensi matrimonii, cum dicta Janeta Wilsone, suam pretensam sponsam, carnaliter cognovit quandam Jonetam Neile, que attingebat sicuti de presenti attingit, sibi Janete Wilsone, in quarto et quarto consanguinitatis gradibus de jure prohibitis, et sic ipse Willielmus Schaw, et dicta Joneta Wilsone, sibi invicem attingunt, in eisdem gradibus affinitatis, propterea dictos Willielmum et Jonetam Wilsone, ab invicem separandas et divortiandas fore prout ipsos separamus et divorciamus per presentes: et quicquid alter alteri dederit dotis et donationis causa, propter nuptias iterum restituendum fore; et hoc omnibus quorum interest notum facimus per presentes."

The *Liber Sententiarum auditorii principalis Sanctiandriensis*, already referred to, likewise contains various cases of nullity of marriage on similar grounds. Thus, in the case of Elizabeth Kinloch against David Ramsay, their marriage was set aside on account of his having previously had carnal connection with Janet Arthur, her relation in the fourth degree, 5th January 1541, fol. 8. Also in the case entitled *sententia in causa divortii Laurencii Gordon et Egidie Marshil*, not dated, fol. 34, decree of nullity was pronounced at his instance, on account of his having been carnally connected with a cousin of his wife before marriage.

Another ground of such divorce or decree of nullity, was *sponsalia jurata* by one of the spouses before their marriage with a third person, though neither followed by actual marriage or a carnal connection. Even previous betrothment of either spouse to a third party, without the intervention of an oath, had the same effect, as appears from an instance in the case of Nicholas Halyday, pursuer, against Margaret Matheson, defender, dated 12th September 1534, in the same MSS. collection.

Relationship, either by affinity or consanguinity of one of the spouses to the other, within the forbidden degrees, or to a former spouse of either, was likewise sufficient to annul the most regular marriage. Thus, for example, decree of nullity was pronounced by the same tribunal, in the case of Margaret Stewart against John Hamilton, because he was related in the fourth degree of affinity to her former husband. The date of this case does not appear; but it is recorded on fol. 189 of the Collection.

Marriage was at the same time held to be constituted by promise *subsequenti copula*, even to the effect of annulling a posterior regular marriage by one of the parties to a third person, *in facie ecclesie*. Of this rule the following example occurs:

"5to Maii, anno 1522.

"Christi nomine invocato nos, Willelmus Prestoune, rector de Bel-toune, ac officialis Sanctiandreensis, infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa matrimoniali tendente ad divortium coram nobis mota et adhuc pendente indecisa inter honestum virum David Johnstoune, actorem ab una, et Margaretam Eldere, suam pretensam sponsam ream, partibus ab altera, cognoscentes juxta ea que vidimus, audivimus, et cognovimus, jurisperitorum com-

municato consilio et secuto, quibus fidelem fieri fecimus relationem in eadem, solum Deum, pre oculis habentes ejusque nomine sanctissimo primitus invocato, per hanc nostram sententiam diffinitivam quam fecimus in his scriptis pronunciamus, decernimus, et declaramus pretensum matrimonium de facto et non de jure inter dictos David et Margretam contractam, et in facie ecclesie solemnizatum carnali copula subsecuta, ab initio fuisse et esse in se nullum et invalidum, et de jure minime subsistere posse, causante impedimento subscripto. Ex et pro eo quod dictus David diu ante solemnizationem dicti pretensi matrimonii, ut supra interdictas, David et Margretam, viz. ad spatium quatuor annorum, alia sponsalia tam per verba de futuro, quam de presenti cum Margreta Abernethy, impresentiarum superstitute, carnali copula subsecuta contraxit, dicendo sibi Margrete Abernethy, verba in vulgari sequentia. I promyth (promise) to zow (you,) Pegis (Peggy) Abernethy, yat (that) I sall mary zow, and yat I sall nevere haiff (have) ane uther wiff (wife,) and yerto (thereto) I giff zow my fayt (faith.) Et similiter, eadem Margreta dicendo eadem verba sibi David e converso, et post probationem hujusmodi verborum, dicta Margareta Abernethy carnaliter fuit cognita per dictum David. Et prefati David et Margreta Abernethy, insimul cohabitarunt in una domo, in mensa, tabula, et lecto, et tanquam conjuges fuerunt habiti tenti et reputati. Propterea dietos David et Margretam Eldare ab invicem separandos et divortandos fore et separari et divortari debere, prout separamus et divortiamus, causante impedimento predicto. Et quicquid alter, alteri, dederit, dotis aut donationis causa propter nuptias, iterum restituendum fore decernimus, et hoc omnibus quorum interest notum facimas per presentes."—*Fol.* 99.

This decision proves further that habit and repute was another mode of constituting marriage under the Canon law of Scotland.

With regard to the party who refuses to fulfil a matrimonial engagement, seriously and deliberately pledged, and to which the other party has adhered and trusted, the justice of this rule may be indisputable. But when such an engagement, after being contracted under the transient influence of passion, perhaps of seduction, is allowed to remain latent until a third person has publicly and solemnly entered into a regular marriage with one of these parties, can it be expedient or just, in any abstract view of the subject, that the dormant claims of those who have acted irregularly and immorally should, if brought forward at any after time, however distant, be allowed to prevail over rights established in conformity to the law, by innocent parties *in bona fide*, although their ruin and the greatest calamities to their children must be the consequence?

The decisions in the cases of Campbell against Cochran, by the House of Lords, on appeal, July 28, 1747, and of Pennycook and Grinton against Grinton and Grant, by remit of the Court of Session, adhering to the judgment of the Commissaries, of 15th December 1752, *Fac. Col.* however, certainly prove that this rule of the Canonists is still the law of Scotland.

The putative regular marriage, indeed, entitles the offspring of that marriage to hold the *status* of legitimacy; and it is understood that this has always been the rule. As to patrimonial rights of succession, would they not, however, necessarily be excluded by a decree, sustaining the previous irregular marriage by promise *subsequente copula*, of their father? or ought such decree only to have effect from the date at which it

is pronounced? No decision, it is believed, has yet gone this length, in favour of the issue of the regular marriage.

But the object of this note was merely to show that marriage did really stand upon a footing far less secure, in Scotland, before the Reformation, than under our present system. From spiritual considerations the Canon law enforced all engagements by which the faith of parties was pledged; more especially if formed under the sanctity of an oath. Hence, both irregular marriages, and promises to marry, if followed by enjoyment of the privileges of marriage, were supported by the Canon law. Upon the other hand, the security of the conjugal relation, when constituted, was brought as much as possible under the power of the church, by extending to an extravagant length the laws of incest, and by admitting the most iniquitous and pernicious proceedings that ever disgraced the administration of justice, for annulling marriages. The effect plainly must have been to place the most important rights of *status* and succession in every family at the mercy of the ecclesiastical judicatures. By similar means, all other transactions and concerns of human life seem to have been subjected to the same jurisdiction, even in Scotland, although, in this country, the Papal usurpations were less systematically and firmly established than in most other Christian States. The depravity of morals thus produced, is proved by the records and documents of those times, to have been extreme; and the improvement, in this essential respect, throughout all Europe, since the Reformation, is the best evidence that the nations which still adhere to the Catholic Faith, as well as those which have adopted the Protestant religion, have derived inestimable benefit from that event.

The dissolution of marriage by divorce for adultery does not, however, appear to have ever been prohibited by any statute of the Legislature, or general rule of law for the kingdom in Scotland. Whether the Ecclesiastical judicatures of the Romish Church in Scotland were, at any period, in use commonly to grant this highest sort of redress when sued for, as well as the inferior remedy of separation *a mensa et thoro*, and as equally lawful, the materials which have been stated are not sufficient to found any opinion, and there has not been leisure or opportunity for further inquiry. But it may be observed, that the practice of these judicatures at the period, when it became most obnoxious, and by its abuses was preparing the minds of the people, in this kingdom, for the Reformation, cannot be regarded as evidence altogether unexceptionable, in so far as it is negative with respect to the state of the Canon law in this kingdom, as to dissolution of marriage by divorce.

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Note (Q.) p. 401.

WHEN the judgment of the Second Division of the Court of Session was pronounced on the defender's bill of advocacy, in the case of Edmonstone, she petitioned for leave to appeal. But this application was opposed on the ground that, during the dependence of the appeal, the pursuer might lose his evidence by the death of witnesses and other casualties. Accordingly, it was refused, for this reason. When the case returned to the Radical Judicature, the Commissaries referred in their subsequent interlocutors to this part of the procedure, and, although they allowed a proof, it was competent for the defender, in the first place, to apply that the evidence, when taken, might be sealed up,

to lie *in retentis*, and at the close of this proof, to apply again for leave to advocate to the Superior Court, on the ground that the conclusion for divorce *a vinculo* was incompetent, or of the contingency of that point to other questions in dependence, with a view there to obtain permission to appeal, after the objection to her former application had thus ceased to exist.

An extrajudicial compromise between the parties, entered into by a regular deed of agreement, put an end to the process at this stage, and unless a Scotch defender in some future case shall be reduced to the necessity of appealing, there seems, from past experience, to be no prospect of having the general question tried in the last resort.

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Note (R.) p. 403.

IN the case of a Gretna Green marriage by English parties, whose domicil continues to be in England, the statute law of their own country is disregarded and evaded by its subjects, and a contract is entered into in another territory, which, although valid by the rule which prevails in this kingdom, would be null and illegal, if not a criminal transaction, by the law of their domicil, were it entered into under its jurisdiction.

Nevertheless, the *lex loci contractus* is respected in England, and a marriage of this description is valid there also.

Whether upon principles of international law, the same degree of *comitas*, as to the constitution of marriage, would be shown in Scotland, is a question which does not seem to have been yet decided, and which may be regarded as at least doubtful. For example, by our statutory rule, the marriage of the guilty party with the paramour, after a divorce for adultery, is prohibited, and unlawful. Suppose the defender, in an action of divorce, to be a subject of Scotland, and the paramour likewise a subject of Scotland, to be named by the decree in obedience to the enactment, and that these parties, nevertheless, afterwards, to evade the statute, pass into England, and enter into a marriage there, which is regular, according to the English law. When they return to Scotland, would this English marriage be held valid here, as the Scotch marriage of English parties at Gretna Green is in England?

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Note (S.) p. 412.

UPON the origin, character, and consequences of such collision, Lord Bacon, in the fragment *De Fontibus juris*, of his Work *De Augmentis Scientiarum*, aph. 96, has made these striking observations: "That Courts should dispute and grapple about jurisdiction is something natural; and the more so, because, through a certain foolish saying (that it is the part of a good and strenuous Judge to enlarge the jurisdiction of his Court), this intemperance is directly fostered, and the spur applied where the rein is wanted. But that Courts, from such vehemence of spirit should rescind at pleasure the judgments pronounced by each other (no way touching jurisdiction), is an intolerable evil, and to be straightway redressed by the King, or the Senate, or the Government. For it is a thing of most pernicious example, that Courts, which minister peace to the subjects, should themselves be engaged in war."

In the words of the ever admirable original, “*Ut curiæ de jurisdictione digladiantur et conflictentur, humanum quiddam est; eoque magis quod per ineptam quandam sententiam (quod boni et strenui sit iudiciis ampliare jurisdictionem curiæ), alatur plane ista intemperies, et calcar addatur, ubi fræno opus est. Ut vero ex hac animorum contentione curiæ judicia utrobique reddita (quæ nil ad jurisdictionem pertinent) libenter rescindant, intolerabile malum, et a Regibus, aut Senatu, aut Politia plane vindicandum. Pessimi enim exempli res est, ut curiæ, quæ pacem civibus præstant, duella inter se exerceant.*”

In quoting Lord Bacon, the reflection must occur, that, while in another passage he points out the regular reporting of decisions as one great means of promoting the improvement of the law in every superior judicature, he recommends that this duty should rather be performed by other persons than by the Judges. But the reasons do not apply to a Judge of the Radical Court, in a case where the decision is, in effect, given by a Court of Review, although in form pronounced by the other. Besides, the Collectors for the Faculty of Advocates in the Court of Session have no access to the materials arising from the discussions in the other Tribunal. Reports of these last, if undertaken at all, must therefore be given by a Member of the Radical Court. The present Reporter is conscious, that infinitely more of leisure and research than he could be permitted to spare for this attempt, was essential to perfect success. Yet, it is not requisite, or to be expected, that a statement of the judicial proceedings in particular cases, should exhaust the general subject to which these belong. And it must be remembered, that the object of this publication is merely to ascertain the true issues that have been discussed, to state the views entertained, and the import of the decisions that have been given upon the most important and difficult of all civil questions, and to furnish some information as to these, which is new, and which may assist the more comprehensive investigations of others in that department of jurisprudence.

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Note (T.) p. 413.

In the bill of advocation presented for the pursuer, Mrs. Rowland, *ex parte*, the question was stated to be “twofold,” viz.

“1st, Whether, in a process of divorce competently and on due citation raised on account of adultery committed in Scotland, it is a good defence to the party, or a reason why the Court should, *ex proprio motu*, refuse to proceed, that the marriage had been contracted, and the parties had formerly lived and been domiciled in England? And, 2dly, Whether the Commissaries have power, in virtue of what is called *comitas*, in such a case, to substitute what is said to be the remedy granted in the English courts of justice, for the remedy which, under the law of Scotland, the Commissaries have power to grant, and have been in the immemorial practice of granting?”

Now, this was not at all the view of the cause entertained by the Commissaries, and which it was the object of their interlocutor, and of the reasons assigned for that judgment, to explain.

Granting the defender to have been duly cited, he was held by them to be, in point of fact, a domiciled Englishman at the date of the action, and the relation of husband and wife between him and the pursuer, and

arising from their English marriage, was held then to subsist in England, where only the parties had cohabited, and where the pursuer also had her sole residence.

But they conceived themselves, nevertheless, to be compelled to exercise their jurisdiction, because the defender had been convened before them *in judicio*, during a transient visit to Scotland, upon the pursuer's action of divorce for adultery.

Thus, the question arose, Whether the law of England, being that of the domicil as well as of the contract of these parties, should be respected in the decision to be pronounced, or if the case was to be regarded as nevertheless one purely of the municipal law of Scotland, because the defender had been convened before a Scotch Court.

Supposing the possession of jurisdiction to be sufficient to resolve this question in the present case, it seemed plainly to follow, that the authority of international law must be altogether rejected in Scotland. But this could not be maintained. Admitting, then, that the principles of international law must be considered, there could be no doubt, that very great evils might be produced, especially in England, were a divorce *a vinculo* to be granted in violation of the rule subsisting in that country, and which would not be respected there.

The next point which occurred was, whether it would be prejudicial to the internal system of Scotland, in regard to religion, morality, or good order, to restrict the measure of redress to that remedy of the Scotch law which corresponded with the English rule, and the conclusion to which the Commissaries came was, that, instead of being prejudicial, it was both just and expedient, not to exceed the redress of separation *a mensa et thoro* of the Scotch law in a case between English parties, whose relation of husband and wife, as it subsisted in their own country, could not be dissolved there by judicial sentence of the Scotch Court.

The argument of the pursuer to the Court of Review, consequently, had no application to the judgment of the Primary Tribunal, at least as that judgment was there understood. By a process of reasoning, completely different, at every stage, it thus became an easy task to draw the conclusions she there maintained. These were, that, "where the jurisdiction of a Judge is admitted, and the redress of a wrong is demanded, the past domicil of the parties is of no importance." That "it was never heard or known, that, either in a civil or criminal cause, a court of justice sustained as a defence, exclusive of legal remedies, that the defender was living in lodgings:" That "the Commissaries have no legislative powers; they are bound to administer the law of their country as it has stood established for ages, and they have no other duty." That our forefathers "gave every possible form of redress for adultery. They treated it as a public crime, as a breach of contract *in essentialibus*, and as an insult which persons of honour and delicacy are not bound to endure." In fine, that "there is no reason in the existing state of society in Scotland, for holding, that our forefathers judged erroneously in this respect; and it is not competent for a court of law to review their judgment. No distinction exists in the law of Scotland between the measure of justice due to a stranger and to a native of the country who has suffered wrong within the country. It is enough that the judge has jurisdiction, and it is of no consequence whe-

ther the defender have this or that kind of establishment within the country, a matter over which the pursuer has no power."

But this train of reasoning avoids the real difficulty of the case. An English or foreign guardian, trustee, or partner of a mercantile company, may be personally convened in that character when found in Scotland, upon a personal action at the instance of a foreign party. Our law, at the same time, authorizes the dissolution of tutory, trust, or copartnery in various cases, and sometimes upon grounds peculiar to our own system. Would our forefathers, however, have attempted to dissolve the relation of guardian and ward, or of copartnery in trade, or of truster and trustee, when subsisting in another territory between foreigners, upon any ground not sufficient by the law of his own country, merely because the defender had happened to be convened here *in judicio*? If this would be incompetent, is not the relation of husband and wife, as it subsists in England according to the municipal system of law which prevails there, much more sacred than any of these?

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Note (U.) p. 413.

THIS case of Rowland was reported by the Lord Ordinary to the Second Division of the Court of Session, upon the pursuer's bill of advocacy, along with that of Levett, and no separate observations were made upon the former by the Judges. By the interlocutors of remit in both of these cases, and the opinions given by the majority of the Court when these were pronounced, it was then in effect decided by the competent authority, that the municipal rule of the Consistorial law of Scotland must be applied in an action of divorce for adultery, although the defender is an English party, and has only become amenable to the Scotch jurisdiction by citation, during that residence of forty days in Scotland, which, by the law of this country, is sufficient to establish a presumptive domicile. The Faculty Report, afterwards published in February last, of the previous decision of the Superior Tribunal, when the cases of Levett and Forbes were originally remitted upon the first bills of advocacy, is given in the preceding Note (G.) of this Appendix, and will probably appear to contain the grounds of the ultimate judgment in the opinions of the majority of the Judges on that occasion. Looking to the record, however, it will be considered whether the Commissaries, when they pronounced their previous interlocutors in the month of August 1816, under the original remits, in the cases of Levett and Forbes, were not then bound to give the best judgment they could form upon the point, whether a transference of the defender's real domicile to Scotland, at the date of the action, was not requisite to produce that legal consequence. At that time the Court of Session had not decided this point, and merely directed that a proof should be allowed, as to the fact of the defender's domicile and residence at the date of the action. As to the *quality* of the domicile to be required, the remit upon the original bills of advocacy contained no instruction. Obedience to the direction of the Court of Review is, indeed, a duty as to which there could be no room for the exercise of discretion, and the record of these cases, now final, will shew that here no deficiency can be alleged. It is also one, the performance of which must have been rendered agreeable by every personal feeling. For the future, accordingly, while the decision of the

highest judicature in Scotland, upon the general question, shall stand unaltered, the whole care of the Commissary Court, in similar cases, must be to follow that precedent. The collision described by the great modern teacher of mankind, in the passage prefixed to this volume, it is, however, evident, may still take place between the judicatures of the sister kingdoms, from discordance of their several laws. But it is to be hoped, that it may not be found impossible for the legislative power to prevent or obviate so great an evil, by salutary improvements, without producing any prejudice to the independence or utility of the municipal jurisdiction in either country.



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1. If adultery, continued for many years, attended with pregnancy and the birth of a child during the husband's absence from Great Britain, be pleaded, it is

useless to prove more than a few facts, such as the birth of a child, identity, and non-access. *Richardson v. Richardson*. 13

2. *Semble*, going to a brothel and remaining alone for a considerable time in a room with a common prostitute is sufficient evidence from which to infer adultery. *Asley v. Asley*. 303
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4. In a suit for separation *a mensa et thoro* by reason of the wife's adultery, she, having in a plea of recrimination, or *compensatio criminum*, proved a long series of misconduct—(adultery, solicitation of the servants' chastity, and venereal disease communicated to her)—for which she separated from him long prior to the adultery committed by her, is entitled to her dismissal; nor will a return to live in the same house, after a former separation on account of the husband's adultery, operate as a condonation so as to extinguish her right to set up his guilt as a bar to his prayer. *Beeby v. Beeby*. 338

#### AFFECTIONS OF TESTATOR.

A testator having, (ten years before his death) when in perfect health, executed a will, and subsequently, a codicil conformable to his ascertained affections; and two years and a half before his death, after a paralytic stroke producing at least great bodily infirmity, having executed a second codicil materially departing from those instruments; and six months before his death, a third codicil revoking the second and reverting to the former disposition; probate of the will, first, and third codicils granted, there being no satisfactory proof of a change in his affections, and the evidence of volition and capacity being at least as strong in support of the third as of the second codicil. *King and Thwaites v. Farley*. 220

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#### AFFIDAVIT, WILL CONTAINED IN.

The original will being lost and no copy in existence, a limited administration with the will (contained in an affidavit) annexed, may be granted to the widow as

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1. When alimony, *pendente lite*, is decreed to commence from the return of the citation, all sums paid subsequent to that return are to be allowed as part payment. *Hamerton v. Hamerton*, 23. *Harris v. Harris*. 153
2. Alimony *pendente lite* is usually about one fifth of the annual income; but the proportion may vary according to the circumstances of the parties. *Hawkes v. Hawkes*. 230
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4. Permanent alimony is always larger than alimony *pendente lite*. Out of an income of 750*l.*, the husband having no state nor family to maintain, 250*l.* allotted to the wife, she taking charge of their only child. *Kempe v. Kempe*. 233

### ALTERATION IN WILL.

On testator's death, an alteration appearing in a will which, during his lifetime, was in the custody of the writer (one of the executors) who swore such alteration was made with the testator's concurrence, but gave no further explanation and declined to propound the will so altered, the Court will assign the executors to take probate of the will in its original state; the residuary legatees, on being personally cited to propound the will or to show cause, &c. not appearing. *Parker v. Hickmott*. 87

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A party, not giving in his answers on the day of the return of the decree personally served, will be pronounced contumacious: *similiter* a witness not appearing to a compulsory. *Wyllie v. Mott and French*. 19

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Appearance waives any objection so far as respects the formality of the proceeding. *Prankard v. Deacle*. 79

### ATTESTATION CLAUSE.

1. A paper having an attestation clause in the plural number, but only one witness, and the date of the year written on an erasure; on affidavit of the executor to a recognition and from the attesting witness to the time and intention of executing, probate of such paper, in common form, may be decreed, though one of four persons entitled in distribution refused to consent; but had entered no caveat. *re Vanhagen*. 208
2. Probate, in common form, of a paper with an attestation clause and no witness, may be decreed to the only person entitled under an intestacy, on affidavit of recognitions of it, as his will, by the deceased. *re Jerram*. 241

### ATTESTING WITNESS.

1. In a will, disposing only of personalty, a legacy to an attesting witness is not void by the 25th Geo. 2. c. 5. *Constable v. Steibel*. 24
2. In a case pregnant with appearances of fraud, and resting for support on the attesting witnesses alone, these witnesses must be beyond suspicion; if at all shaken in credit, no part of their evidence can be relied on. *Brydges v. King*. 125

### ATTORNEY.

1. The Court will grant administration, with papers annexed, to a person, as attorney of an executor according to the tenor, without requiring a regular power of attorney; such person being clearly authorized, by letter from that executor, to act: the executor of the residuary legatee (who was also executor, but did not take probate) having consented. *re Ormond*. Page 67

### ATTORNEY AND CLIENT.

1. Mere evidence of execution of a will and codicil, by a person of weak and inert mind, appointing his attorney and agent sole executor and almost universal legatee of a large property, is insufficient without proof of instructions by

the deceased; the instructions for the will being given to the solicitor, who prepared and attested it, by and in the handwriting of the executor's father (also the deceased's co-agent and attorney); the codicil being prepared exclusively for his own benefit by the executor, in whose house the deceased was living apart from his family: and other circumstances strongly inferring fraud and circumvention. *Ingram v. Wyatt*. 167

2. Courts of Equity have in many instances set deeds aside on account of the relation of influence in the person obtaining, and of confidence in the person granting the benefit: as in the cases of Guardian and Ward, Attorney and Client, Agent and Principal, and the like; more particularly in respect to Attorney and Client. *Ibid*. 170

3. All Courts jealously guard suitors against that sort of influence and knowledge which Attornies, Agents, Guardians, &c. possess, and may exercise injuriously towards their Clients. Where such relations of confidence exist, and where the party frames an instrument for his own advantage and benefit, every presumption arises against the transaction. In the case of such an executor, it is not necessary to prove fraud and circumvention; he must remove the suspicion by clear and satisfactory proof. *Ibid*. 171, 172

Though the parties may stand in any such suspicious relation, and though there may be suspicious conduct and some deficiency of capacity, yet satisfactory evidence of the *factum* may establish the instrument: it is not in law invalid. *Ibid*. 174

#### BAR.

1. Slighter acts will bar than will found an original suit. *Asley v. Asley*. 303
2. *Semble*, a single act of adultery is sufficient to bar the husband's remedy. *Ibid*. 303
3. Entering into a voluntary deed of separation and bringing an action on that deed, does not bar a wife from proceeding for a divorce in the Spiritual Court, nor bear unfavourably on her case. *Durant v. Durant*. 310
4. In suits of adultery, &c. mere lapse of time is not sufficient to bar the wife's remedy. *Ruding v. Ruding*. 314, *notis*. Also, *Popkin v. Popkin*, 325, *notis*.

#### BONA NOTABILIA.

A Diocesan administration obtained by one next of kin may be directed to be brought in, and pronounced null and void on the prayer of another next of

kin who had taken out a Prerogative administration: the diocesan administrator being personally cited, and showing no cause to the contrary. *Loton v. Loton*. 293

#### BOND, SEPARATION.

In the complainant's absence in India, the bond, enjoined by the 107th canon in all sentences for divorce, may be executed by his brother, his attorney. *Richardson v. Richardson*. 16

#### BRAWLING.

1. In a suit for *brawling*, under 5 & 6 Edw. 6. c. 4. § 3., the words of *brawling* must be set forth in the articles. The words "other enormous ecclesiastical offences" in a citation are surplusage, and will not support a charge of *smiting* under 5 & 6 Edw. 6. c. 4. § 2. *Jenkins v. Barrett*. 16
2. A threatening posture is not *smiting* under the statute. *Ibid*. 16
3. The 5 & 6 Edw. 6. c. 4. was not intended to abridge the ecclesiastical jurisdiction in cases of *brawling*. *Ibid*. 16
4. Provocation is no defence to a criminal suit for *brawling* in a church at a vestry meeting. On proof of the offence, the defendant suspended for a fortnight *ab ingressu ecclesie*, and condemned in costs. *North and Little v. Dickson*. 310

#### CALLING IN ADMINISTRATION.

1. Two papers having been propounded by an executor in an allegation which was rejected, and administration thereupon taken out by the next of kin; on a legatee under one of those papers calling in the administration, and the administrator appearing under protest, the protest may be allowed to stand over in order that the legatee, on showing he was not cognisant of the former proceedings, &c. might bring in an allegation; the appointment of the executor being in one paper, the interest of the legatee entirely under the other, and the two papers not necessarily connected. *Wood v. Medley*. 275
2. An executor having propounded papers in an allegation which was rejected, and administration being thereupon decreed to the next of kin; a legatee cannot be allowed to call in such administration in order to repropound the same papers, unless he can bring in an admissible allegation, and show by affidavit that the facts have come to his knowledge since the rejection of the former allegation; in which case *semble*, that even the executor might re-propound them. *Ibid*.

An allegation re-propounding two unfinished papers rejected, the facts not being sufficient to rebut the adverse presumption of law: and the administrator, who appeared under protest, dismissed with costs. *Ibid.* 283

3. Where administration was granted in 1791, on the renunciation of the next of kin, to a creditor who died in 1806; when no *de bonis* grant was taken out till March 1827, and when an administration, limited to certain leasehold property, and granted at that time (without citing the next of kin) to a nominee of the persons in possession of such property, was, in February 1828, called in by the representative of the next of kin, such representative held barred by time and circumstances, and the administrator, who appeared under protest, dismissed with costs. *Skeffington v. White.* 297

### CANCELLATION.

An executor having, in pencil, altered a will (by the direction of the testator who approved of it when so altered) and then cancelled it only in order that another might be drawn up, the preparation of which was prevented by the death of the deceased; probate, in common form, of the cancelled will (in its original state) will be granted on a proxy of consent from all persons interested. *re Applebee.* 66

### CAPACITY.

1. The clearest and most consistent evidence of capacity and volition are required to support a codicil conveying bequests of such extent as to be irreconcilable with the character of the deceased, and with her intention as proved by her affections and former testamentary dispositions; the deceased being at the time within ten days of her death and in a state of extreme weakness and debility, all her confidential friends excluded or absent, and those only about her who are benefited under, or engaged in, the preparation or execution of the instrument. *Brydges v. King.* 109
2. When the opinions of persons, apparently intending to depose fairly, are contradictory as to capacity (particularly if facts show the deceased was occasionally capable), the Court will infer a fluctuating capacity. The will of a person in such a state, of which will probate was taken out four months after the deceased's death and not called in for two years and a half, pronounced for; there being satisfactory evidence of instructions and of

capacity at the time of the *factum*; the disposition contained being consistent with his affections, and its variation from a will, executed before his mind became impaired, being accounted for by a change of circumstances. *Williams formerly Cook v. Goude and Bennet.* 252

3. The asserted will of a person of fluctuating capacity (totally abandoning the principles of a former disposition, made before the deceased's faculties were impaired, and long adhered to) pronounced against; and the executor, the person principally benefited, who among other things indicative of fraud, had himself given the instructions, and whose son, a minor, alone spoke to the execution, condemned in costs. *Dodge v. Meech.* 267

### CHURCHWARDENS.

Churchwardens are, to a certain degree, the guardians of the moral character and public decency of their respective parishes. *Griffiths v. Read and Harris.* 86

### CLANDESTINITY.

Clandestinity is a strong indication of fraud. *Brydges v. King.* 135

### COHABITATION.

1. If a wife proceeding against her husband for cruelty and adultery was not originally justified in withdrawing from cohabitation, the Court must pronounce her under the obligation to return. *D'Aguilar v. D'Aguilar.* 330
2. The general presumption is that a husband and wife, living in the same house, live on terms of matrimonial cohabitation, but particular circumstances may repel that presumption. *Beeby v. Beeby.* 338

### COMPENSATIO CRIMINUM.

1. In a suit for separation *a mensa et thoro*, the wife's adultery being fully established, but she having on a recriminatory allegation proved facts antecedent to her adultery from which the Court necessarily presumed the husband's adultery, this amounts to *compensatio criminum*, and the wife is entitled to be dismissed. *Astley v. Astley.* 303
2. The doctrine received in the Ecclesiastical Courts of England from the civil and canon law, that a plea of recrimination, or *compensatio criminum*, is a valid plea in bar, is founded on the principle that a man cannot complain of the breach of a contract which he has violated. *Beeby v. Beeby.* 338

## CONCLUSION OF CAUSE.

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## CONDONATION.

1. In a suit for divorce on account of the husband's adultery, after a condonation of former adulteries, there must be, in order to establish condonation of subsequent adultery as a bar to the wife's remedy, evidence that she was aware of this renewed misconduct; nor can such knowledge be inferred from slight facts, and from cohabitation, but it must be clearly and distinctly proved. *Durant v. Durant*. 310
2. Cruelty revives condoned adultery. *Worsley v. Worsley*. 311
3. If a wife forgives earlier adultery upon condition and assurance of future amendment, on the husband again committing adultery that previous injury revives. *Ibid*. 311
4. *Quære*, whether condonation, unless as far as is admitted by the adverse case, can be set up without being pleaded. *Semble*, that in no case has it been held to estop a party where not pleaded. *Durant v. Durant*. 310
5. Condonation is forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness: on breach of the condition the right to a remedy for the former injuries revives. *Ibid*. 311
6. A conditional promise made under force and violence to return to the husband's bed is no condonation, if the condition is not fulfilled. *Popkin v. Popkin*. 325. *notis*.
7. The mode in which after a separation a return to cohabitation was effected is material to show, whether there was or was not condonation. *D'Aguilar v. D'Aguilar*. 329
8. All condonations by operation of law are expressly or impliedly conditional; for the effect is taken off by the repetition of misconduct. *Ibid*. 329
9. The wife's unwilling acquiescence in a return to live in the same house, but without connubial cohabitation, does not amount to a complete forgiveness. *Ibid*. 329
10. Conjugal cohabitation after an act of adultery avowed by the husband to the wife may be condonation; but if a wife overlooks one act of human infirmity it is not a legal consequence that she pardons all other acts. *Ibid*. 330
11. Condonation is not held so strictly against a wife as against a husband. *Ibid*. 330
12. Condonation is forgiveness legally releasing the injury, and may be express; or implied—as by the husband cohabiting with a delinquent wife; but the effect of cohabitation is less stringent on the wife, and condonation by implication is not held a strict bar against her, for it is not improper she should for a time show a patient forbearance and entertain hopes of her husband's reform. *Beeby v. Beeby*. 338
13. Unpleaded condonation can only so far avail as a bar, as it is fully established by evidence. *Ibid*. 338
14. It does not follow that because condonation will bar the remedy of a party agent, it will destroy the defence of a party recriminating. *Ibid*. 338
15. Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed: it does not rest merely on the wife's not withdrawing herself. *Dance v. Dance*. 341. *notis*.

## CONDUCT OF PARTY.

1. It is not necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious to be patient as long as possible. Forbearance does not weaken her title to relief. *Popkin v. Popkin*. 325. *notis*.
2. A wife's delay in applying to the Ecclesiastical Court for redress from cruelty does not infer that there is no ground for complaint, nor even raise a presumption against the truth of the charge. *D'Aguilar v. D'Aguilar*. 329

## COSTS.

1. Costs are much in the discretion of the Court upon a just consideration of all circumstances. *Griffiths v. Reed and Harris*. 210
2. The Court will not direct the Deputy-Registrar to allow the Solicitor of a party, who has a new Proctor, to be present at the examination by consent of the bill of costs of his former Proctor; such an attendance being unusual and unnecessary to the purposes of justice. *Peddle v. Evans*. 293
3. Bills of costs between a Proctor and his party are of common law cognizance; the Ecclesiastical Court has no jurisdiction over them: the examination of such bills by the Deputy-Registrar is only by consent and *ex gratia*; and neither party is thereby bound as to the amount. *Ibid*. 293
4. The Ecclesiastical Court can enforce the payment of costs where one party is condemned in costs to the other party; and such costs are then taxed by the Judge, in open Court, on the report of

the Deputy-Registrar, subject to objection from either party. *Ibid.* 293

### COSTS (FULL) GIVEN.

*Semble*, a next of kin, a *fortiori* a legatee under a former will, contesting a will under circumstances manifestly vexatious may be condemned in the whole costs. *Green v. Proctor and Newey.* 147

### COSTS MODIFIED.

A party, failing to establish a possessory title to a pew, condemned in 20*l. nomine expensarum* to the Churchwardens. *Wylley v. Mott and French.* 19

### COSTS OF WIFE.

In general the husband is bound to provide for the wife's costs and alimony *pendente lite*; but the wife, if the Court deems she has sufficient separate means, is not entitled to either, she then stands on the common footing of a litigant party, and on proving her case has a *prima facie* right to costs. It is, however, discretionary with the Court on a consideration of all the circumstances to relax the rule. *D'Aguilar v. D'Aguilar.* 331

### COSTS OUT OF ESTATE.

The principle on which costs are given out of the estate is, that the party was led into the suit by the state of the testamentary papers. *Hillam v. Walker.* 30

### CRIMINAL SUIT.

1. On appeal in a criminal suit, an extension of the term probatory being prayed by the Promoter, a delay of nine months, without making substantial progress in the cause or examining a single witness (after the suit had been already depending, in the court of appeal, two years) is a sufficient ground to dismiss the defendant, and condemn the Promoter in payment of a sum *nomine expensarum*. *Jenkins v. Barrett.* 12
2. In criminal suits articles must be so specific as to afford a fair opportunity of defence. *Oliver and Toll v. Hobart.* 20

### CRUELTY.

1. One act of cruelty of an inflamed nature and sufficiently gross to excite terror entitles the wife to relief. *Popkin v. Popkin.* 325. *notis.*
2. An husband's attempt to debauch his own women servants is a strong act of cruelty. *Ibid.* 325
3. The husband's conduct is legal cruelty, if by cohabitation the wife is exposed to bodily hazard and intolerable hardship. On proof of such conduct and of the husband's adultery with three different women, a sentence of separation *a mensa et*

*thoro* pronounced at the wife's prayer, and the husband condemned in her costs. *D'Aguilar v. D'Aguilar.* 329

4. The husband taking to a separate bed is not pleadable as cruelty. *Ibid.* 329. *notis.*
5. Words of abuse and reproach are not, but words of menace intimating a malignant intention of doing bodily harm and affecting the security of life are, legal cruelty. The Court must not wait till threats are carried into execution, but must interpose where words raise a reasonable apprehension of violence and excite such terror as make life intolerable. *Ibid.* 329. *notis.*
6. Spitting on the wife is a gross act of cruelty. *Ibid.* 329
7. Obtaining the wife's separate property by imposition cannot, but compelling her by threats to go any where may, be be pleaded as cruelty. *Ibid.* 329
8. If words of menace raise a reasonable apprehension, it matters not whether they be addressed to the wife or to a third party. *Ibid.* 329
9. An intermediate separation so approximates two periods of cohabitation that acts of cruelty, happening before the separation, are to be looked upon as if they had happened recently. *Ibid.* 329
10. Cruelty may be relative and depend on the age, habits, &c. of the party. *Ibid.* 329

### DECREE TO SEE PROCEEDINGS.

A next of kin, contesting a will propounded by an executor, may take out a decree citing all persons interested under the will "to see proceedings." *Colvin v. Fraser.* 48

### DISMISSAL OF PARTY.

A next of kin declaring "he proceeds no further" in contesting a will, the Court will dismiss, and not condemn him in costs, because it is *pleaded*, "that he attempted to suborn an attesting witness:" nor will the Courts allow affidavits in proof of the attempt. — *Meek and Donald v. Curtis.* 58

### EVIDENCE.

1. In a concerted account of a fraudulent transaction, the most striking contradictions may be expected on the minor details or collateral facts, rather than on the leading circumstances. *Brydges v. King.* 131
2. Evidence extracted upon cross examination (in order to show condonation, *compensatio criminum*, or to discredit one adverse witness by another) if relied on as the sole ground of defence, has far slighter effect than when a defensive, recriminatory, or exceptive

plea is given in and examined to. *Durant v. Durant.* 310

3. In examining evidence and proofs, the Court must not take the charges insulated and detached, but the whole together, and must consider what has been the admitted conduct of the party under similar circumstances. *Ibid.* 310
4. The remoteness of facts deposed to accounts for the witnesses relating them with less precision and distinctness. All that the Court can require is to be satisfied that the evidence is substantially true. *D'Aguilar v. D'Aguilar.* 329
5. To domestic conduct friends, dependents and servants can alone speak; they must have some bias, and the Court must receive their evidence with some drawbacks. *Ibid.* 329

#### EXAMINER.

If in a plea, the construction of an article be doubtful, an Examiner would act prudently in taking the evidence down and leaving it to the Court to reject it afterwards, if extra-articulate. *Ingram v. Wyatt.* 46

And see p. 43. *notis.*

#### EXECUTOR.

1. The act of the executor, being the appointee of the deceased, binds to a certain extent all persons interested under the will; but a party may at a future time allege collusion. *Colvin v. Fraser.* 48
2. The executor of a former will deriving all his interest from—and if deprived of such interest being deprived by—the act of the deceased, is not entitled in opposing a later will to the same indulgence as a next of kin, who has by law a right to the succession unless ousted by the express direction of the deceased. *Young v. Brown.* 243
3. *Sembla*, that an executrix (the widow) who, after taking probate and acting for many months under a will by which she takes a smaller interest than by a former will, causes the later will to be opposed by questioning the deceased's capacity, and then refuses to propound such will, is liable to be condemned personally in the costs of a substituted residuary legatee who propounds and establishes the will; and such refusal being tantamount to renouncing, would justify the Court in revoking the probate, and decreeing administration, with the will annexed, to such residuary legatee. *Williams v. Goude and Bennet.* 252
4. *Sembla*, that the act of an executor, being the appointee of the deceased, binds all persons interested under an asserted will, unless collusion be shown. *Wood v. Medley.* 291

5. Generally speaking, a legatee is bound by the act of the executor. *Ibid.* 286

#### EXECUTOR ACCORDING TO TENOR.

1. Directing certain persons to pay debts, funeral expenses, and expenses of probate, is an appointment of such persons as executors. *re Fry.* 35
2. A person, appointed limited executor in a will, may be appointed general executor in a codicil by implication and without express words. *re Aird.* 147
3. The Court at Madras, the competent jurisdiction, having granted probate to the widow, as universal legatee and constructive executrix of an informal paper, in which character no security is required; this Court, considering that under the circumstances the widow may be called on to prove the paper *per testes*, or that the grant may be appealed from, will only decree administration with the paper annexed to her, as relict and principal legatee, on giving security. *re Read.* 206

#### EXECUTOR, APPOINTMENT OF.

A person dying in Scotland having by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate granted to the nominees as executors. *re Cringan.* 240

#### EXECUTOR, MOTION FOR THE EXAMINATION OF, REFUSED.

*MacLae v. Ewing and Reid.* 138. *notis.*

#### EXHIBITS.

After publication, on an affidavit that the depositions have not been seen, and that the matter is "*noviter perventa*," exhibits may be pleaded. *Jones v. Jones.* 108

#### FACULTIES, ALLEGATION OF.

1. In answer to an allegation of faculties, it is proper to state that the wife brought no fortune; but not, that her father is possessed of large property. *Harris v. Harris.* 153
2. The estimated value of all marketable securities must be included in the calculation of the husband's income, in order to the allotment of alimony *pendente lite*. *Ibid.*

#### FACULTY.

A faculty for the appropriation of a vault "to the use of a family so long as they continue parishioners and inhabitants of the parish" will be granted if it may be done without probable inconvenience to

the parish. *Magnay v. the Rector, &c. &c. of St. Michael, &c.* 20

### FEME COVERT.

1. Payment of a legacy decreed to a married woman "whose receipt was to be a discharge to the executor notwithstanding coverture:" her husband (a bankrupt) and the provisional assignee being first cited. *Norris v. Hemingway.* 12
2. A married woman living apart from her husband, being joined in probate of a will (authorizing her "to act as executrix, in all respects, without her husband") but not having intermeddled; the Court, on the Bank refusing to transfer stock without the husband, will revoke such probate, and grant it to the remaining executors. *Meek and Donald v. Curtis.* 58
3. Where a married woman propounds a paper the husband must join in the proxy. *Arbery v. Ashe.* 91
4. A married woman having under a certain settlement and also under her mother's codicil made a will; and under her mother's codicil specifically, and under "all and every other power," &c. generally made a second will with a general revocatory clause; the Court of Probate will grant a general administration with the latter will annexed, but not pronounce against the former will; leaving it to the Court of Construction to decide whether the former will is thereby revoked. *Draper v. Hitch.* 289

### FOREIGN LAW.

1. Administration, limited to the receipt of dividends in the English funds, granted to a minor, residuary legatee—the wife of a minor; both subjects of, and resident in, Portugal; on a certificate being produced that by the law of Portugal she was entitled. *re Countess da Cunha.* 100
2. Probate of the will of a married woman, a native of, and domiciled in, Spain, granted according to the law of Spain to one of her sons as executor, on affidavit as to the law of Spain, and the identity of the parties. *re Donna da Maraver.* 219

### FORUM DOMICILII.

1. In decreeing probate, the Court is usually regulated by the grant of the Court of Probate where the party was domiciled; i. e. the competent jurisdiction—in this instance, the Court of Supreme Judicature at Fort William, Bengal. *Larpent v. Sindry.* 166
2. The question, whether other Courts of Probate are to be governed by the decision of the Court of Probate where the party was domiciled, has never been ex-

pressly determined; but such has been the general practice. *Ibid.* 166

3. It is not fully decided, whether the Prerogative Court is bound, in all cases and under all circumstances, to follow the grant of probate made by a Court of competent jurisdiction. *re Read.* 207

### FRAUD, SUSPICION OF.

Snapping a probate, as it is called, is always considered to create a suspicion of fraud. *Ingram v. Wyatt.* 204

### FRAUDS, STATUTE OF.

*Quære*, whether the statute of frauds applies to a nuncupative will made in Peru. *re Moresby.* 165

### GUARDIAN.

*Semble*, that the guardian of a minor instituting a suit cannot be condemned in the costs incurred (after a proxy has been exhibited) on behalf of the party then become of full age. *Green v. Proctor and Newey.* 147

### HANDWRITING.

1. In Courts of Probate it is almost a settled principle not to pronounce for disputed papers on evidence of handwriting alone. *Constable v. Steibel.* 25
2. Evidence to the genuineness, not of a mere signature, but of a holograph of some length, is more cogent and weighty than evidence of a contrary tendency. *Ibid.* 25
3. Dissimilitude of handwriting is very weak and deceptive evidence and of alight weight only against evidence of similitude; but against positive evidence of witnesses attesting and deposing to a signature as actually made in their presence it can scarcely have any effect. *Young v. Brown.* 249

### HUSBAND AND WIFE.

1. All persons (*ex. gr.* Jews) who stand in the relation of husband and wife in any way that the law allows, have a claim for relief on the violation of any matrimonial duty. *D'Aguilar v. D'Aguilar.* 329
2. The husband's rights that may legally be insisted on by the due exercise of marital authority, must not be enforced by indignity, brutal violence, nor by threats. *Ibid.* 330

### IMPERFECT PAPER.

The Court will not on affidavit grant probate of an imperfect paper unless all parties interested are consenting or cited. *re Edmonds.* 296

### IMPOTENCY.

To found a sentence of nullity by reason of

impotency the impediment must be shown to have existed at the marriage, and to be incurable. Impediment not incurable. *Semble*, that an impediment not natural but supervening is no ground of nullity. *Brown v. Brown.* 250

### INFLUENCE.

The influence to vitiate an act must amount to force and coercion destroying free agency, and there must be proof that the act was obtained by this coercion. *Williams v. Goude and Bennet.* 252

### INFORMAL PAPER.

1. A paper, with certain names and sums opposite to them and accompanied by bank notes of corresponding amount, is of testamentary validity. *Huble v. Clark.* 54
2. Letters containing final testamentary intentions are valid as a will, the deceased considering no further act necessary; nor will they be invalidated by the deceased not having subsequently disposed (as she had purposed) of a small part of her property. *Manly v. Lakin.* 60
3. Administration with a paper annexed, wherein were sundry alterations in the body, a blank left for the date, and where the paper itself appeared, from internal evidence, to have been written more than nine years before death, and was endorsed "outline of the will," cannot be granted in common form, on the exhibition of a proxy of consent from all interested under an intestacy, there being no evidence to rebut the presumption that the paper was deliberative. *re Hearne.* 93
4. Probate, in common form, of two papers (one unfinished) granted on a proxy of consent, and on affidavits accounting for their state and showing that the deceased intended them to operate. *re Broderip.* 212

### INSANITY.

1. Supervening insanity is sufficient to account for the non-execution of a paper written shortly before, and consistent with the intentions and affections of the deceased; nor will it so reflect back on previous eccentricity as to invalidate such a paper. *Hoby v. Hobby.* 68
2. One of the strongest proofs of re-established faculties is the consciousness and admission of the party himself that he had been disordered. *Ibid.* 71
3. Insanity vitiates all acts. *Portsmouth v. Portsmouth.* 156

### INSTRUCTIONS.

1. Instructions for a will, containing the fixed and final intentions of the deces-

ed, are valid, if the formal execution is prevented by death. *Burrows v. Burrows.* 49

2. Though instructions are not necessary where the capacity is not doubtful, yet where imposition and custody are suspected the defect of instructions is extremely material, more especially where the writer makes himself executor, per Dr. Calvert, in *Middleton v. Forbes*, cited in *Ingram v. Wyatt.* 173

### INTENTION.

- A doubt, whether a testator intended a particular bequest to form part of his will and to take effect, will not vitiate the whole will, especially if a strong disinclination to die intestate be shown. *Hawkes v. Hawkes.* 139

### INTERROGATORIES.

Interrogatories not being ready, and twenty-four hours having elapsed after notice to the adverse Proctor of the production of a witness, the witness has not, under all circumstances, a right to be dismissed. *Ingram v. Wyatt.* 42

### INVENTORY.

1. An inventory and account may be demanded of an executor by a residuary legatee who has given a release. *Kenny v. Jackson.* 47
2. The Court will not, at the instance of the assignee of an insolvent and on a suggestion that the insolvent had not received his distributive share, call upon the widow and administratrix of the father of the insolvent for an inventory and account, after a long acquiescence of the insolvent and his assignee; and when it is shown that a valuation and inventory of the deceased's effects were made shortly after his death; and when facts are proved from which it may fairly be presumed that the insolvent had received considerably more than his full share. *Pitt, assignee of Woodham, v. Woodham.* 105
3. A Court of Probate can only require that all the deceased died possessed of should be included in the inventory: It cannot call for an account of the subsequent profits on his business. *Ibid.* 105

### IRREGULARITY IN PROCEEDINGS.

1. Where, on the death of the Archdeacon, the proceedings in a criminal suit were moved, after the execution of a proxy, but before appearance by the defendant either personally or by proxy, from the Archidiaconal to the Episcopal Court and there went on to sentence, the original Proctor appearing for him, but without a new proxy; on appeal, the

appellant having been cognizant *de facto* of the progress of the suit, and through his Proctor, in the Court of Appeal, having recognized (by some of the formal documents in the cause) that the Proctor in the Court below was his lawful Proctor, the proceedings are valid; nor is it a fatal objection that the articles were exhibited in the name of the *surrogate* and not of the *Judge*. *Prankard v. Deacle*. 78

2. Whether (the Archidiaconal and Episcopal Courts being concurrent) it is any irregularity, even in form, on the death of the Archdeacon, to invoke the causes in his Court into the Episcopal Court, *Quære. Ibid.* 79

### JURISDICTION.

1. Usages of different dioceses, in respect to the exercise of jurisdiction, if not contrary to the general policy of the law, and to justice, may be said to constitute the law of the particular diocese in that respect. *Prankard v. Deacle*. 79
2. If the Court of Arches clearly has no jurisdiction, it will not suffer parties to proceed and to incur unnecessary expence; it will stop without waiting for an injunction: but if the point be at all doubtful the Court is bound to proceed; for to refuse the exercise of a jurisdiction which is competent to entertain the suit, and to which a party applies, is a "sort of denial of justice." *Grignion v. Grignion*. 235
3. Causes of subtraction of legacy are undoubtedly of the cognisance of the Arches Court. The executor receives his authority from the ecclesiastical jurisdiction; a part of his functions (which he is expressly sworn to perform) is to pay the legacies; if he omits to discharge this duty, the jurisdiction from which his authority emanates may compel him to proceed. *Ibid.*

In these cases Courts of Equity exercise a concurrent jurisdiction, upon the principle that all executors are in the nature of trustees. If there is an unfinished trust, or if the interest of third parties is to be protected, Courts of Equity have not merely a concurrent, but an exclusive jurisdiction. *Ibid.* 235

4. The will of a party who died in Scotland, and all whose property, within the province of Canterbury, was in the diocese of London (some of it in the funds) having been proved in the Consistory Court of London, and the Deputy Registrar of that Court having appeared under protest to a monition to transmit such will, the Prerogative Court will not overrule the protest, holding a prerogative probate unnecessary, as the Archbishop and Bishop of London have by

practice a concurrent jurisdiction in such cases: It will, however, in aid of justice, grant an additional probate, if required, limited to the property in the funds. *Scurth v. the Bishop of London*. 273

### LEGATEE.

1. A legatee under a former will who, after long acquiescence, calls in probate of and contests a later will, (setting up a case of incapacity and undue influence which is disproved,) will be condemned in costs from the time of giving in the allegation. *Green v. Proctor and Newey*. 147
2. A legatee performing the duty of an executor in proving a paper is entitled to his costs out of the estate. *Williams v. Goude and Bennet*. 267

### LETTER, TESTAMENTARY.

The deceased having, between instructions for, and the execution of, his will, delivered to his solicitor a letter of testamentary import to be put with his will, probate thereof decreed as, together with the formal instrument, containing the last will of the deceased. *re Dunn*. 214

### LUNACY.

On renunciation of a co-executor the Court will not grant administration with the will annexed (without justifying securities) to the daughter, the residuary legatee, during the lunacy of the mother—the other executor. *re Hardstone*. 213

### MARRIAGE.

1. To render a marriage contract valid, the consent of a free and rational agent is an essential ingredient. *Portsmouth v. Portsmouth*. 162
2. Question. Whether the Jurisdiction of the Consistorial Court of Scotland is competent in an action of divorce between English parties, upon the ground that the defender has been cited, and convened in Scotland? *Utterson v. Tewsh*. 347
3. Question. Whether divorce *a vinculo* should be granted, in conformity to the law of the Scottish Jurisdiction, although the parties are English and have been married in England, and retain their real domicile in that country at the date of the action; upon the ground that the offender has been cited and convened in Scotland, for adultery committed there? *Duntze v. Level*. 360
4. Same question between Irish parties. *Butler v. Forbes*. 401
5. Question. Whether the redress for adultery should not be restricted to se-

paration *a mensa et thoro*, because the marriage had been celebrated in England, although the parties were Scotch, and had their only domicile in Scotland at the date of the action? *Edmonstone v. Lockhart*. 389

6. Parties English, and married and domiciled in England, but defender cited upon action of divorce for adultery during a visit of less than two months in Scotland. Question, Whether divorce *a vinculo* should be granted? *Kibblewhite v. Rowland*. 406

### MEMORANDUM.

Where minors are concerned, probate, in common form, cannot be granted of a mere memorandum of doubtful construction on affidavits showing that the deceased intended to increase the benefit of certain legatees under a formal will, and was prevented by death from giving his solicitor instructions to that effect. *re Gibbs*. 163

### MONITION.

When no sufficient cause is shown for neglecting to comply with a monition personally served, a party may at once be pronounced contumacious; but *aliter*, for a mere informality, if he has virtually obeyed or is ready to obey, the monition. *Hamerton v. Hamerton*. 17

### "NOVITER PERVENTA."

Facts of adultery newly come to the knowledge of the party may be pleaded after publication; but such pleas must be strictly watched. *Webb v. Webb*. 152

### NULLITY OF MARRIAGE.

1. A marriage *de facto* solemnized, under circumstances of clandestinity inferring fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor (who had great influence over him and by whom he was clearly considered and treated as of unsound mind) pronounced null and void; and the pretended wife condemned in costs. *Portsmouth v. Portsmouth*. 154
2. When a fact of marriage has been regularly solemnized the presumption is in its favour; but it must be solemnized between persons competent to contract that engagement, the very essence of which is consent; and without soundness of mind there can be no legal consent—none binding in law. *Ibid*. 156
3. In a suit of nullity of marriage by reason of the impotency of the man, a certificate (twelve years after marriage) that the woman was *virgo intacta* and *apta*

*viro* coupled with two several confessions by the man of his incapacity to two medical witnesses, and with proof that the woman's health had suffered, (though the man had not given in his answers, had removed into France and refused to undergo surgical examination) held sufficient. *Pollard, falsely called Wybourn v. Wybourn*. 308

### NUNCUPATIVE WILL.

The Court will grant administration with a nuncupative will annexed, as contained in an affidavit of three witnesses, holding that 29 Car. II. c. 3. s. 23. applies to merchant seamen. *Morrell v. Morrell*. 20

### PAROL EVIDENCE.

1. In a Court of Probate an ambiguity, on the face of a paper, as to the *factum*, lets in parol evidence. *Draper v. Hitch*. 289(a)
2. In order to the admission of parol evidence, in a Court of Probate, to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be on the face of the paper, and the facts to be proved must completely remove that ambiguity. *Ibid*. 289

### PAUPER.

A party may commence a suit *in forma pauperis*. *re Jones*. 36

### PENCIL ALTERATIONS.

1. When pencil alterations are inferred to be deliberative, probate, in common form, will be granted of the paper without such alterations; the only party materially injured by such grant having executed a proxy of consent. *re Howe*. 88
2. The *prima facie* presumption is, that pencil alterations are deliberative, and those in ink final; when they are of both kinds in the same instrument the presumption is strengthened. *Hawkes v. Hawkes*. 139
3. The presumption of law, that pencil alterations are deliberative, may be strengthened by circumstances,—such as that the paper was, originally, carefully drawn up, and that it shows the deceased to have been a very precise man; while the alterations are incomplete and inaccurate, rendering the sense imperfect and the meaning doubtful. *Edwards v. Astley and others*. 215

### PENCIL, DOCUMENT IN.

Probate may be granted, in common form, of a will written entirely in pencil by the deceased, who, a few days before death, declared she wished it to operate, unless altered. *re Dyer*. 92

PEW.

1. In a libel for perturbation of seat, a title must not be pleaded as founded on purchase, sale, letting, or bequest, all which are illegal and void. The suit may rest on a possessory title, and acquiescence of former churchwardens, and on the fitness of the party—from the number of family, amount of property, &c. *Wyllie v. Mott and French.* 19
2. Pews in a church belong to the parish for the use of the inhabitants, and cannot be sold, nor let, without a special act of parliament. *Ibid.* 19
3. Churchwardens must exercise a just discretion in the allotment of pews, subject to the correction of the ordinary. *Ibid.* 19
4. The occupier of a pew, ceasing to be an inhabitant of the parish, cannot let the pew with, and thus annex it to his house, but it reverts to the disposal of the churchwardens. *Ibid.* 19
5. A pew can only be appropriated to a house by faculty or by prescription. *Ibid.* 20
6. In a suit for perturbation of seat, if it appears that the churchwardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish by taking the pew more out of the power of the churchwardens. *Ibid.* 20

PLEADING.

2. In a cause of divorce, articles to account for the husband's delay in instituting the suit are admissible, but need not be examined to, unless the defence renders it necessary to justify his conduct. *Richardson v. Richardson.* 13
2. In a suit for divorce by reason of the wife's adultery, it is irrelevant to plead in the libel, that "she had been extravagant, had entered into a dissipated mode of living, and incurred debts to a considerable amount." *Ibid.* 14
3. A party being before the court in a suit for divorce by reason of cruelty, acts of adultery subsequent to the citation may be pleaded. *Barrett v. Barrett.* 22
4. Deeds should not be annexed to an allegation, but be deposited in the registry, and the material parts only recited in the plea. *Mynn v. Robinson.* 29
5. Where the widow, in opposition to a will, sets up habitual intoxication, weakened capacity and custody, she may also plead insane dislike on the part of her husband, to account for their living apart, though the delusion may not be sufficient

per se to invalidate the will. *Reay v. Coucher.* 32

6. Where fraud is charged, the Court allows a greater latitude of pleading than in ordinary cases; but, even then, remote facts must not be as minutely stated as those which bear directly on the point at issue. *March v. Tyrrell and Harding.* 61
7. The Court will not, at once, reject an allegation propounding a will which "sounds to folly," when facts are pleaded showing that the deceased, up to his death, conducted himself in the ordinary concerns of life as a sane man. *Arbery v. Ashe.* 89
8. Where the husband's adultery is to be proved by pregnancy and acknowledgment of children, it is not necessary to plead particular acts. *Durant v. Durant.* 310
9. The wife's knowledge and forgiveness of adultery is matter of defence, and to be proved. *Popkin v. Popkin.* 325 *notis*
10. A libel, pleading specific acts of adultery and cruelty, can only be rejected *in toto* on one of two grounds: 1st, that the plea on the face of it shows a case impossible of proof; 2nd, that it evidently appears from the facts pleaded that the party complaining has barred herself. *Popkin v. Popkin.* 325 *notis*
11. In a suit for divorce by reason of the husband's adultery and cruelty, the Court will not inquire into his depriving the wife of her separate property; *aliter* as to her paraphernalia. *D'Aguilar v. D'Aguilar.* 329 *notis*
12. Minute acts should not be pleaded, but properly come out in evidence. *Ibid.* 329 *notis*
13. Where the charge is of keeping certain specified houses to which the husband took divers loose women, specification of place is sufficient without specification of time. *Ibid.* 329 *notis*
14. A long adulterous intercourse and cohabitation, the birth, maintenance, and acknowledgment of a child, are pleadable, if there is nothing that necessarily affects the wife with the knowledge thereof. *D'Aguilar v. D'Aguilar.* 329 *notis*
15. If the Mosaic law as at present received allows concubines, such a privilege could not be noticed without being specially pleaded. *Quære*, whether it could be noticed at all in the courts of this country. *Ibid.* 330

PRACTICE.

1. If due diligence has been used, the Court will grant an extension of the term probatory, in order that material witnesses may be examined. *Portsmouth v. Portsmouth.* 11

2. On appeal in a criminal suit, an extension of the term probatory being prayed by the promoter, a delay of nine months without making substantial progress in the cause or examining a single witness, (after the suit has been already depending in the court of appeal two years,) is a sufficient ground to dismiss the defendant, and condemn the promoter in payment of a sum *nomine expensarum*. *Jenkins v. Barrett*. 16
3. On affidavit, that an attesting witness has been diligently sought and cannot be found, an executor may pray publication; but the other party has a right to a monition against the witness to attend for cross examination, if they can discover him. *Mynn v. Robinson*. 29
4. The Court having decided that a legatee, in a separate paper, is not executrix according to the tenor, she cannot oppose the validity of a former will if the executor of that will is ready to take probate of the paper by which she is benefitted, and if she is paid the full bequest and her costs. *Hillam v. Walker*. 30
5. An original will, disposing of real estate in Scotland, may (certain conditions being complied with) be delivered out of the registry in order to be proved and recorded at Edinburgh. *re Russell*. 40
6. A sentence of the Prerogative Court, pronouncing against a will and decreeing administration to the daughter, having been affirmed by the Court of Delegates, and the cause remitted; the Court will not allow the execution of the sentence to be delayed, by a prayer for an answer to the interest of the widow who had been cognizant of, though not cited to see, proceedings, nor by a caveat. *Dew v. Clark*. 135
7. Administration being granted to a person out of his majesty's dominions, the sureties in the bond should be resident within the kingdom. *re O'Byrne*. 137
8. The executors having died in the deceased's lifetime, a joint limited administration, with the will of a married woman under a power annexed, granted to five residuary legatees, to whom a similar grant had been made at York (the *forum domicilii*), and who were all parties to a suit in Chancery. *re Blacklock*. 292
9. Where affidavits contain irrelevant matter, the Court will not allow them to be read, but what is relevant may be taken as read. *Peddle v. Evans*. 293 *notis*
10. The Court will not hear, on an *ex parte* motion and on affidavits, a case where offences are charged and punishment prayed. *Ibid*. 293

#### PROBATE IN COMMON FORM.

By granting probate, in common form on

affidavits, the Court does not preclude any one interested in the property from contesting the paper at a future period. *re Dyer*. 92

#### PROCTOR.

When a party regularly complains of gross extortion by his Proctor, the Court may punish the Proctor by suspension or otherwise. *Peddle v. Evans*. 293 and *in notis*

#### PROOF.

1. If adultery continued for many years, attended with pregnancy, and birth of a child during the husband's absence from Great Britain, be pleaded, it is useless to prove more than a few facts—such as the birth of a child, identity, and non-access. *Richardson v. Richardson*. 13
2. Handwriting and finding are sufficient to support a codicil confirming a legacy under a will, which codicil came out of the custody of, and was propounded by, the person solely benefited under it, who had been sworn executor of the will and one codicil four months before producing this paper, and the validity of whose legacy under the will was, at the time, a question depending in the Court of Chancery. *Constable v. Steibel and Emanuel*. 23
3. In a criminal suit for incest instituted under circumstances indicative of vindictive feelings, sleeping in the same room, (conduct which the parties proceeded against had been allowed, without objection or complaint, to continue for thirteen years) though attended by other facts inducing a strong presumption of guilt, is not sufficient proof of the offence; and the Court, unless most stringent and conclusive evidence be produced, will dismiss the parties, but give no costs. *Griffiths v. Reed and Harris*. 79
4. A will, completely the reverse of repeated testamentary acts firmly adhered to for several years, requires clear proof of capacity and execution. *Dodge v. Meech*. 268

#### PROXY.

A proxy, from a husband in India to institute proceedings, in the Court of Exeter, against his wife for adultery; held, the wife having changed her residence before the commencement of the suit into another diocese, that the Court of Arches may proceed under letters of request from that latter diocese without a new proxy from the husband. *Hawkes v. Hawkes*. 79

#### "QUI SE SCRIPSIT HÆREDEM."

1. By the civil law if a person wrote a will

in his own favour the instrument was void. That rule has not been adopted in its full extent by the law of England, which only holds that such conduct creates a presumption against the act, and renders necessary very clear proof of volition and capacity; and for obvious reasons: the testator reposes confidence in his attorney, and is less on his guard against imposition; while the attorney from skill and knowledge is more likely to be successful in such a contrivance, and has more influence so as to obtain a blind acquiescence. *Ingram v. Wyatt.*

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2. *Qui se scripsit heredem* renders a will void under the civil law, though it is not so by the law of England. *Per Dr. Calvert, in Middleton v. Forbes.*

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#### RE-EXAMINATION.

After publication, the Court will not allow witnesses to be re-examined in the ordinary mode, on a suggestion that the examiner from a misconstruction of the plea has improperly rejected evidence: but, if essential to justice, it may direct a *viva voce* re-examination in open Court. *Ingram v. Wyatt.*

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#### REPRODUCTION OF WITNESS.

A legatee (whose legacy had been paid to him) having been examined without releasing, allowed to be re-produced on his and the executor's giving mutual releases, and on the latter depositing in the registry, to abide the issue of the cause, a sum sufficient to cover the legacy. *Cooper v. Derriennic.*

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#### "RES INTER ALIOS ACTA."

"Res inter alios acta" is not an objection applying to the introduction of a verdict in a prosecution by the party against whom the verdict is pleaded. *Bray v. Bray.*

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#### RESCINDING CONCLUSION.

The Court before granting a prayer to rescind the conclusion, in order to the admission of an allegation, requires an affidavit setting forth facts, material as well as "noviter perventa:" and it generally also requires that the allegation, pleading those facts, shall be tendered at the time of making the prayer. *Smith v. Blake.*

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#### RESIDUARY LEGATEE.

Notwithstanding the statutes require that administration shall be granted to the next of kin, a residuary legatee has been decided, and is always considered to have

a prior title to an administration *cum testamento annexo.* *re Gill.*  
See also *Reece v. Stafford.*

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#### REVIVAL OF FORMER WILL.

1. The destruction of a latter will revives a former will nearly of the same import, the motive on which the variation was made having ceased to operate; and reconciliation to, and declaration in favour of, the universal legatee under the former will, just previous to death, being shown: such revival being always a question of intention, and admitting the introduction of parol evidence. *Kirkcudbright v. Kirkcudbright.*
2. It is not settled, whether the principle of law is that, on the revocation of a latter will, a former will is presumed to revive or not. *Ibid.*

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#### REVOCATION OF ADMINISTRATION.

A legatee for life of certain property having assigned over his interest to the substituted legatees, an administration with a will annexed, limited to that interest and granted to the legatee for life, may be revoked, and a new administration limited to that property decreed to the substituted legatees then possessed of the sole entire interest therein. *re Ferrer.*

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#### REVOCATION OF WILL, PRESUMED CONDITIONAL.

The deceased, supposing his will, appointing his wife sole executrix and universal legatee for life, to be lost, made in Peru a nuncupative will (not in conformity with the statute of Frauds) with a general revocatory clause, and appointing two executors and his wife universal legatee absolutely: the executors renounced, and she took probate of that will in Peru. The former will being found (of which fact the testator was ignorant at the time of his death) probate thereof, at the prayer of the widow, granted to her. *re Moreaby.*

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#### SECURITY FOR COSTS.

When a party is out of the kingdom the Court will direct him to give security for costs. *Hillam v. Walker.*

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#### SPOILIATION.

1. When a testamentary paper is asserted to have existed since the death of the alleged testatrix, and to have been subsequently destroyed, these allegations must be proved by the clearest and most stringent evidence. *Huble v. Clark.*
2. The widow having after the testator's

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death caused his will to be destroyed, probate of the draft of such will granted; and the widow condemned in the whole costs of the suit. *Martin v. Lak- ing and Oldham.* 103

3. By 7 and 8 Geo. 4. c. 29. s. 22. steal- ing, or the fraudulent destruction or concealment of any testamentary instru- ment is punishable by transportation for seven years, fine or imprisonment, or both. *Ibid.* 105. *notis.*

### SUBSTITUTION OF EXECUTOR.

A testator having appointed two execu- tors, and provided that, on the death of either of them, two others should be substituted; on the death of the original executor who had proved the will, and on a proxy of consent from the other, probate will be granted to one of the substituted executors; it appearing to have been the testator's intentions that the substitution should take place on the death of either of the original executors, whether happening in the testator's life- time or afterwards. *re Lighton.* 99 also 100. *notis.*

### SUBTRACTION OF LEGACY.

A sum of money being left to the execu- tors, in trust to invest and pay the inter- est to A. for life, and after A.'s death to divide the principal among his issue on their respectively attaining the age of twenty-one, with benefit of survivorship till that age; A. being dead, his only three children majors, and the shares of two of them paid over, the Court will proceed, in a suit of subtraction of le- gacy against the executor, to enforce payment of the third's share, holding that the character of trustee is at an end, and that of executor alone subsist- ing. *Grignion v. Grignion.* 234

### SUICIDE.

If there is no evidence of the deceased's insanity at the time of or prior to in- structions for his will, the commission of suicide, three days afterwards, will not invalidate the paper by raising an inference of previous arrangement. *Burrows v. Burrows.* 49

### TESTAMENTARY SCHEDULE.

Probate will not be granted to a paper ne- ver seen by, nor read over, but only ex- plained, to the deceased who died sud- denly before he saw the solicitor; the answers of the executor (speaking

against his own interest) being the only evidence of instructions which were ver- bally conveyed by him to the solicitor; especially when the intentions of the de- ceased appeared fluctuating, and when there was a previous paper, in his hand- writing. *Mactae and Ewing v. Reid.* 137

### UNEXECUTED PAPER.

1. Written and verbal instructions being given from which a will was prepared, the execution of which was prevented by unforeseen circumstances and by death; the Court, the widow consent- ing, will grant probate of the will so prepared (though never seen by, nor read over to the deceased) in preference to granting administration, with the in- structions annexed, to the widow: the deceased's intention being clearly to se- cure the interests of his children by the interposition of executors. *re Bathgate.* 28
2. The Court will not (on affidavits of ca- pacity and final intention and on con- sent) decree probate in common form of a paper written from dictation of the party in *extremis*, and confused; where the interest of minors and of an infant is affected. *re Ross.* 205
3. An engrossed copy of a will having been read over to, and approved by, the deceased who intended to execute it shortly afterwards; but was prevented by death: probate in common form granted (with consent of the only person inter- ested under an intestacy) of one of the originally engrossed sheets, and of two fairly copied sheets substituted for, and (except as to some clerical errors not af- fecting the disposition) corresponding with the sheets approved by the deces- ed. *re Harvey.* 251
4. Execution being only prevented by death, the Court will decree probate in common form on a proxy of consent from all *in esse* interested; but those not *in esse* will not be bound by the grant. *re Taylor.* 274
7. The Court will not grant probate, in common form, of a paper formally drawn up, but unexecuted, and which the de- ceased clearly intended to alter; nor of a subsequent paper in the deceased's hand-writing, but undated, unsigned, and apparently unfinished; and with no- thing to ascertain that it was written shortly before the death, or that it em- bodied the final intentions of the deces- ed; the deceased being an illegitimate spinster, and the Crown opposing the grant. *re Robinson.* 274

# UNFINISHED PAPER.

1. To entitle an unfinished paper to proof, it is necessary, 1st, to connect it most clearly with the deceased: 2dly, to show fixed and final intention: 3dly, completion prevented. *Jameson v. Cooke.* 36
2. Papers, on the face of them, unfinished, with no circumstances to account for such their state, are presumed to be abandoned, and consequently are not entitled to probate. *Cundy v. Medley.* 65
3. Extrinsic evidence is necessary to make an unfinished paper operative; nor will a proxy of consent from all entitled in distribution, or otherwise, justify the Court in granting probate to such an instrument, unless the affidavits set forth facts, which, if proved in solemn form of law, would sustain a disputed paper. *re Hurrell.* 107
4. A paper manifestly unfinished and imperfect cannot be proved on mere affidavits of finding, hand-writing, and the non-existence of any other testamentary paper. *re Wenlock.* 241
5. When an instrument is unfinished, its state must be accounted for, either by showing completion prevented or that the deceased, abandoning his intention of finishing it, meant it to operate in that form without any further act. *Wood v. Medley.* 283
6. In order to the grant of probate in common form of an unfinished paper there must be, 1st, affidavits stating such a case as if proved by depositions would establish the paper; and, 2dly, consent implied or express from all parties interested. *re Thomas.* 294

# VARLANCE..

In a criminal suit it is not a fatal variance that the defendant, in the citation, was designated "Harris," and, in the articles, "Harris" alias "Harry." *Griffiths v. Reed and Harris.* 80 *notis.*

# VARIATION IN GRANT FROM DECREE.

1. The Court will grant administration with the will annexed to one of two universal legatees, a decree with intimation having issued in the name of the other who was since dead. *Law v. Campbell.* 22
2. Administration *de bonis non* with a will annexed, in which was no executor, granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee: the sureties justifying in the amount of the surplus beyond the interest of the one legatee, or (on a proxy of con-

sent from the other) beyond their joint interests; and an affidavit of no outstanding debts being made. *Pickering v. Pickering and Pickering.* 210

# VENEREAL DISEASE.

1. The husband's attempt, when affected with the venereal disease, to force his wife to his bed is of a mixed nature, partly cruelty and partly evidence of adultery, and would remove condonation of either. *Popkin v. Popkin.* 325. *notis*
2. Venereal disease long after marriage is *prima facie* evidence of adultery. *Ibid. notis*

# VERDICT.

In a suit for separation by reason of cruelty brought by the wife, an acquittal of her witnesses (for a conspiracy in counselling her to institute this suit) upon an indictment laid by the husband, and his evidence thereon (in which he admitted and repeated certain accusations originally alleged in the libel as acts of cruelty) may be pleaded as a continuation and admission, on oath, of that cruelty. *Bray v. Bray.* 76

# WILL.

1. If no suspicion of fraud exists, a will, consistent with previous affection and declarations, and supported by recognitions and circumstances showing volition and capacity, is valid, though made *in extremis*, and though the instructions were conveyed through the party benefited. *Ross v. Chester.* 95
2. A testator, while at variance with his relations, having made a will in favour of a stranger in blood, being afterwards reconciled to his family and his full capacity down to his death being admitted: a subsequent will,—in favour of his family—produced shortly after his death from the custody of the drawer, who took nothing under it, nor was acquainted with those benefited by it, and the *factum* whereof, though occurring in secret and in a strange manner, was proved by the drawer and two unimpeached witnesses—pronounced for; and the executor of the former will condemned in 20*l. nomine expensarum*, he having directly alleged the second will to be a forgery, but succeeded in showing the drawer to be of doubtful character. *Young v. Brown.* 243
3. Marriage and birth of issue is not an absolute but a presumptive revocation of a prior will; the law presuming an intention to revoke arising from a change of condition and from new obligations: if

such change of condition and such new obligations are provided for, and the intention to revoke cannot be presumed, the revocation does not take place. Therefore a will, in favour of the issue of a former marriage, is not revoked by a subsequent marriage and birth of issue, such marriage and issue having been provided for by settlement. *Talbot v. Talbot.* 299

**WITNESS.**

Under suspicious circumstances the deposition of a witness, not cross examined, may be sealed up; but, on a subsequent satisfactory explanation, may be delivered out subject to all objections at the hearing. *Ingram v. Wyatt.* 42

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